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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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No. 330

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRA-  
TION AND NATURALIZATION, PETITIONER

VS.

JOSEPH GEORGE STRECKER

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1938

CERTIORARI GRANTED OCTOBER 17, 1938





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WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 IN UNITED STATES DISTRICT COURT, EASTERN  
DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

No. 983 (Law)

UNITED STATES OF AMERICA, EX REL JOSEPH GEORGE STRECKER

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION  
AND NATURALIZATION

Appearances: C. A. Stanfield, Esq., Hot Springs, Ark., Attorney for Joseph George Strecker, Appellant. Rene A. Viosca, Esq., U. S. Attorney, and Leon D. Hubert, Jr., Asst. U. S. Attorney, appearing on behalf of Eugene Kessler, District Director of Immigration & Naturalization, Appellee.

Appeal from the District Court of the United States for for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from the 21st day of September 1937, at the City of New Orleans, Louisiana.

Extensions of time granted by Honorable Wayne G. Borah, Trial Judge, bringing the return day up to and including the 17th day of December 1937.

2 In United States District Court

In the Matter of the Application of Joseph George Strecker for a Writ of Habeas Corpus

*Petition for writ of habeas corpus*

Filed June 16, 1937

To the Honorable JUDGE OF THE SAID COURT:

The petition of Joseph George Strecker of Hot Springs, in the County of Garland, State of Arkansas, respectfully represents:

I. That your prisoner is imprisoned, detained, and restrained of his liberty by one Eugene Kessler, District Director, New Orleans District, Immigration and Naturalization Service, United States Department of Labor, who now confines your petitioner in the city of New Orleans, Louisiana:

II. That the cause or pretense for such imprisonment and detention is that your petitioner is an alien now in the United States illegally and subject to deportation to Poland; that the sole authority for the detention of the petitioner is a warrant of arrest and one of deportation issued by the Secretary of Labor of the United States.

III. That warrant of arrest and warrant of deportation are void because: 1. The alien has not been accorded a fair hearing by the Labor Department. 2. The Labor Department has not correctly construed the immigration laws and rules. 3. There is no evidence in the record of the Labor Department to sustain the finding contained in the warrant of deportation. 4. Petitioner is not an immigrant from or citizen of the Republic of Poland. 5. Petitioner has been denied due process of law.

IV. Wherefore, your petitioner prays that a writ of habeas corpus may be granted and issued, directed to the said Eugene Kessler, commanding him to produce the body of petitioner before your Honor at a time and place therein to be specified, then and there to receive and do what your Honor shall order concerning the detention and restraint of your petitioner; and that your petitioner be restored to his liberty.

(Signed) JOSEPH GEORGE STRECKER,

(Signed) C. A. STANFIELD,

Attorney for Petitioner.

4 Dated June 16th, 1937.

[Duly sworn to by Joseph G. Strecker; jurat omitted in printing.]

4

#### Order

Let a writ of habeas corpus issue as herein prayed for returnable on Monday, June 21, 1937, at 10:30 o'clock A. M.

(Signed) RUFUS E. FOSTER,

Judge.

JUNE 16, 1937.

In United States District Court

#### Answer

Filed June 31, 1937

To the Honorable the JUDGE OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA:

Now into Court, through undersigned counsel, comes Eugene Kessler, District Director, New Orleans District, Immigration & Naturalization Service, made respondent in this matter, and for answer to the petition of the relator says:

1. Respondent admits the allegations of Paragraph 1 of relator's petition.

2. Respondent admits that his authority for the detention of the relator is a warrant of deportation issued by the Secretary of Labor for the United States of America, and respondent denies further allegations of paragraph 2 of the petition.



3. Respondent denies the allegations of paragraph 3. Further answering respondent says:

#### I

The relator, Joseph George Strecker, was born in Kamionka, Strumilowa #12, Republic of Poland on August 28, 1888, and has always been and is now a citizen of the Republic of Poland; respondent alleges that relator has never been naturalized as a citizen of the United States.

#### II

On November 25, 1933, a warrant of arrest was issued by the Secretary of Labor against the relator directing that he be taken into custody and given a hearing to enable him to show cause why he should not be deported in conformity with law.

#### III

Acting upon this warrant of arrest the relator was taken into custody and on January 23, 1934, and May 8, 1934, he was given hearings by immigration inspectors in accordance with law; at both hearings relator was represented by counsel and given an ample opportunity to present whatever defense he saw fit and to produce whatever evidence he saw fit.

#### IV

On the basis of the hearings above referred to, complete reports of which were forwarded to the Secretary of Labor, an order of deportation was issued on August 14, 1934, by the Secretary of Labor directing that the relator be deported to Poland for the reasons set forth in said order of deportation which will be produced at the time of the trial of this writ.

#### V

The order of deportation above referred to is based upon substantial evidence taken at the hearings above referred to, which evidence was sufficient in law to support the findings of fact made by the Secretary of Labor.

#### VI

On October 22, 1936, relator was recognized by the Republic of Poland as a citizen of Poland and on the same date a passport was issued by the Polish Consul General at Chicago to the relator.

#### VII

Respondent further alleges that relator is an alien who believes in, advises, advocates, and teaches, and who is a member of and affiliated with an organization that believes in, advises, advocates, and teaches

the overthrow by force and violence of the Government of the United States.

### VIII

Respondent further alleges that on June 25, 1936, relator filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas, Western Division, in the matter entitled "In the Matter of the application of Joseph George Strecker for a Writ of Habeas Corpus," No. 8183, and that on

October 13, 1936, a full hearing was had on this matter before the Honorable Judge John E. Martineau, United States District Judge for the Eastern District of Arkansas, who took the matter under advisement, and on January 28, 1937, denied the petition for a writ of habeas corpus and dismissed the case; respondent further shows that relator failed to perfect an appeal taken from the judgment of Judge Martineau and on May 17, 1937, the matter was docketed and dismissed in the Circuit Court of Appeals for the Eighth Circuit, and the mandate dismissing the appeal was recorded in the United States District Court for the Eastern District of Arkansas on May 17, 1937.

### IX

Respondent alleges that the instant proceeding is identical with the habeas corpus proceeding in the Eastern District of Arkansas; that no new facts are presented; that no new points of law are raised; and therefore, respondent believes and so alleges that the application for a writ of habeas corpus in the instant matter is made for the sole purpose of delaying the order of deportation issued in this matter almost three years ago.

Wherefore the premises considered, respondent prays that the application for a writ of habeas corpus in this matter be denied and that the case be dismissed.

And for all general and equitable relief.

(Signed) LEON D. HUBERT, Jr.,  
Assistant United States Attorney.

### AFFIDAVIT

[Duly sworn to by Leon D. Hubert, Jr.; jurat omitted in printing.]

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In United States District Court

*Agreed statements of facts*

The Relator, Joseph George Strecker, is a citizen and native born subject of Austria. In 1912 he legally entered the United States as an alien immigrant from Austria. In 1933 he filed a petition for naturalization as a citizen, but before completing the necessary steps, this proceeding was begun against him.

On November 25, 1933, the Department of Labor issued a warrant of arrest for the relator and ordered that he be given a hearing to show cause why he should not be deported. This warrant of arrest is Government Exhibit I. Pursuant to this order of arrest, the relator was given a hearing in Hot Springs, Arkansas, on January 23, 1934, at which time he was represented by counsel. The record of this hearing is Exhibit II. At this hearing there was introduced in evidence by the Department of Labor a statement made by the relator to Carroll D. Paul, Immigration Officer on October 25, 1933.

This statement is Exhibit III. There was also introduced in evidence at this hearing Membership Book No. 2844 of the Communist Party of the United States of America (section of the Communist International) in the name of Joe Strecker. This book is Exhibit IV. There was also introduced in evidence a report of Walter L. Wolfe, Naturalization Officer. This statement is Exhibit V.

On May 8, 1934, the relator was given another hearing in Hot Springs, Arkansas, being represented by counsel, and at that time the Government offered in evidence certain extracts from a magazine entitled "The Communist," dated April 1934. These extracts are included herein as Exhibit VI.

At both the hearings of January 23, 1934, and May 8, 1934, the relator was represented by counsel and was permitted to cross examine witnesses and to introduce witnesses. The hearings were held in the office of relator's counsel in Hot Springs, Arkansas.

Based on the record of these hearings, the Secretary of Labor on August 14, 1934, issued a warrant of deportation against the relator. This is Exhibit VII.

On June 25, 1936, relator filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. This petition was based on the same ground as the instant one. After hearing the evidence, the Honorable John E. Martineau, District Judge, on January 28, 1937, denied the petition for writ of habeas corpus, but allowed an appeal to his judgment. This appeal was never perfected and hence on May 13, 1937, it was docketed and dismissed in the United States Circuit Court for the Eighth Circuit.

The instant proceeding was begun on June 16, 1937. A hearing on this petition was held before the Honorable Wayne G. Borah on June 30, 1937. At that time the Government introduced all of the exhibits heretofore referred to.

The relator took the stand and testified as follows:

That Cecil Brock, a police officer of the Hot Springs Police Department, came to his home sometime in August 1933, without a warrant, and over his objections searched the home and took from his house the membership book (Exhibit III). Mr. I. H. Vincent and Mr. Carroll D. Paul, of the Department of Labor, testified that the aforesaid membership book had reached them through "Official

Channels" or department correspondence. There was no other evidence on the subject. The record of the Labor Department hearing does not indicate that objection was made at the hearing to the introduction of this card in evidence.

That on October 16, 1933, Cecil Brock, the Hot Springs Police Officer, again came to his home and required him to go to the office of one Mr. Emory, Arkansas District Prosecuting Attorney, where he met Mr. Wolfe, who, the witness said, informed witness that he was the Examiner to naturalize him.

That on October 25, 1933, a certain Captain L. A. Cooper, of the Hot Springs Police Department, and Mr. Carroll D. Paul came to his home and took him into custody; that he was taken to the jail and to a small room therein, and that there he was frightened and intimidated by the presence, threats, and cursing of the police officer, whom the witness stated had a reputation for viciousness and "Third degree" methods; that his answers to Mr. Paul's questions were incorrectly transcribed; that he was not advised that the statements he made to Paul were to be used against him; that he was taken immediately to the jail and examined without being afforded an opportunity to secure counsel; that the statements ascribed to him were inaccurate; that, "they (Mr. Wolf and Mr. Paul), wrote out what they wanted and made me sign like they wanted to."

11 That in November 1932 he saw a lady talking at a meeting in Hot Springs; that he just went in; that it was a Communist party meeting; that he was not then a member; that the speaker "was talking about how they raising prices, and people destroying corn, wheat, cattle by millions, and how they make the prices, and prices going too high; she said to educate, work for peace not for war, they want peace on this earth. She (the speaker) say: 'I am 100% Democrat.' That it what I thought, it is the same thing." That he put in sixty cents and she mailed him the membership book. That he was a paid member of the Communist Party from November 1932 to February 1933. That the Communist did not and that he did not advocate the overthrow of the government; that he believed in a democratic government; that he was not a member of the Communist Party in April 1934, nor at any time since February 1933. That he did not resign but simply did not pay more dues. That he had never heard of the "Communist," the magazine from which excerpts had been introduced at the hearing.

The Government then introduced Mr. CARROLL D. PAUL, the Immigration Officer, who took the statement of October 25, 1933, who testified as follows:

That the alien was not frightened or intimidated; that the statements were written by him in longhand at the time they were given and were correct; that he might have edited the alien's statements to correct the grammar, transposition, or something of that sort, but it was otherwise transcribed as made; that he did not advise the alien of his right to counsel at that time; that the examination



was a preliminary one and that the alien was not in custody; that he and the policeman carried the alien with his consent to the jail in the policeman's automobile; that there was no warrant of arrest and that he did not consider that the man was in custody; that the statements were given without threats, without intimidation, and without any show of force or any promises.

The Government Exhibits introduced here constitute the record on which the order of deportation is based.

After hearing all the evidence and the arguments of counsel, the Honorable Wayne G. Borah denied the application for a writ of habeas corpus.

(Sgd.) C. A. STANFORD,  
Counsel for Relator,  
Joseph George Strecker.

(Sgd.) LEON D. HUBERT, JR.,  
Assistant U. S. Attorney.

### *Exhibit I*

#### Warrant—Arrest of Alien

Bureau of Immigration.  
Form 8-A.

UNITED STATES OF AMERICA,  
DEPARTMENT OF LABOR,  
Washington.

2023/5257.

No. 55848/822.

To District Director of Immigration and Naturalization, Galveston, Texas, or to any Immigration Inspector in the Service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Joseph Strecker, alias Joe Strecker, who landed at the Port of New York, N. Y., on or about the 7th day of November 1912 has been found in the United States in violation of the immigration act of October 16th, 1918, as amended by the act of June 5, 1920, in that he believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; that he is a member of or affiliated with an organization, association, society, or group that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating, or teaching the overthrow by force or violence of the Government of the United States, and that he is in the United States in violation of Section 2

of the act approved October 16, 1918, as amended by the act approved June 5, 1920, in that after his entry into the United States he has been found to have become a member of one of the classes of aliens enumerated in Section 1 of such act, as amended to-wit: an alien who is a member of or affiliated with an organization, association, society, or group that believes in, advises, or teaches the overthrow by force and violence of the Government of the United States.

I, W. W. Husband, Second Assistant Secretary of Labor by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1934." Pending further proceedings the alien may be released from custody under bond in the sum of \$1,000.00:

14 For so doing this shall be your sufficient warrant.

Witness my hand and seal this 25th day of November, 1933.

[SEAL]

(Signed) W. W. HUSBAND,

Second Assistant Secretary of Labor.

*Exhibit 2, being record of hearing before Isaac H. Vincent, immigration inspector, held on January 23, 1934, at Hot Springs, Ark.*

UNITED STATES DEPARTMENT OF LABOR,  
IMMIGRATION AND NATURALIZATION SERVICE,  
New Orleans, Louisiana.

New Orleans File 34009/62.

In the matter of:

Name: Joseph George Strecker.

Alias: Joe Strecker.

Age: 45 years. Sex: Male.

Nationality: Poland.

Race: German.

Record of Hearing. Under Department Warrant of Arrest No. 55848/822, dated November 25, 1933.

Present for the Government: Isaac H. Vincent, Imm. Inspector.

Present for the alien: Felix L. Smith, Attorney for alien. Hearing held at Hot Springs, Arkansas, Jan. 23, 1934.

15 Stenographer: Inspector Isaac H. Vincent. Interpreter: English spoken.

Result of Medical Examination: None. Alien released on \$1,000.00 bond.

Verification of landing: None.

Last foreign address: Kamionka Strumilowa No. 12, Poland.

U. S. Address: 213 Magnolia St., Hot Springs, Arkansas.

Relatives in the United States: None.

Passport Status: None.

Description: Height 5' 8"; weight 150 lbs.; eyes brown; hair brown; face oval; nose large; mouth average; descriptive marks: right middle finger injured.

Property and effects: Four-room house 213 Magnolia St., household goods; sixty acres timber land, Montgomery County, Arkansas; mortgages on property amounting to about \$2,000; one trunk and two grips.

Foreign address to which deportable: Poland.

Hearing held at office of Attorney Felix L. Smith, 301½ Central Avenue, Hot Springs, Arkansas, Jan. 23, 1934.

By Inspector ISAAC H. VINCENT:

Alien, being first duly sworn, testifies, in English, as follows:

Q. What is your correct name?

A. Joseph George Strecker.

Q. Have you ever been known by any other name?

A. No other.

16 Q. Where were you residing at the time of your apprehension and arrest?

A. 213 Magnolia Street, Hot Springs, Arkansas.

(Note: Alien apprehended by Inspector Isaac H. Vincent.)

Q. What is the date of your birth and where were you born?

A. I am 45 years old; I was born at Mamionka, Strumilowa No. 12, Poland. I was born August 28, 1888.

Q. Of what country are you now a citizen and of what race are you?

A. Citizen of Poland, of the German race.

Q. I will now show, serve upon you, and read to you Department warrant of arrest No. 55848/822, dated Nov. 25, 1933, wherein it is charged "you have been found in the United States in violation of the Immigration Act of October 16, 1918, as amended by the Act of June 5, 1920, in that you believe in, advise, advocate, or teach the overthrow by force or violence of the Government of the United States; that you are a member of or affiliated with an organization, association, society, or group that believe in, advise, advocate or teach the overthrow by force or violence of the Government of the United States; that you are a member of or affiliated with an organization, association, society, or group that writes circulars, distributes, circulates, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the overthrow by force or violence of the Government of the United States; and that you are in the United States in violation of Section 2 of the Act approved October 16, 1918, as amended by the Act approved June 5, 1920, in that after your entry into the United States you have been found to have become a member of one of the classes of aliens enumerated

17 in Sec. 1 of such Act, as amended, to-wit: an alien who is a member of or affiliated with an organization, association, society or

group that believes in, advises or teaches the overthrow by force or violence of the Government of the United States." This hearing is granted you in order that you may show cause, if any there be, why you should not be deported from the United States. Under the law you have the right to services of counsel or a lawyer, at your own expense, to represent you at this hearing. Do you understand the charges in the warrant, and your right to representation?

A. Yes.

Q. Will you secure the services of a lawyer in these proceedings?

A. Yes; Mr. Felix L. Smith, of Hot Springs, is my lawyer; he is present.

Q. The warrant for your arrest provides for your release from custody pending the final determination of your case by the Secretary of Labor, Washington, D. C., upon furnishing bond in the sum of \$1,000.00. Do you understand, and are you prepared to furnish bond?

A. Yes; I will furnish bond in the sum of \$1,000.00.

Q. What is your occupation?

A. I am now renting rooms in my house. I used to be a restaurant keeper.

Q. Have you been arrested or convicted of a crime or misdemeanor involving moral turpitude at any time?

A. No, sir; never in my life.

Q. Give me the dates of your last and previous entries into the United States?

A. I entered the United States November 7, 1912, on the S. S. "Bremen"; that is the only entry I have ever made to the United States.

Q. Have you resided in the United States since that time?

A. Yes.

Q. I hand you transcript of your sworn statement made before Immigrant Inspector Carroll D. Paul, dated October 25, 1933, taken at Hot Springs, Arkansas, which will be read to you by your attorney.  
(Statement read to alien by attorney.)

18 Q. I would ask you to let me know if this statement is true and correct, and, if not, in what way it differs from the statement you made?

A. The answers as transcribed were not as given by me. They never put any answers in as I told him, and I could not stop him. I was excited and intimidated. He looked at me hard and hammered on the desk. He was mad and made me mad. I can't remember in detail just what my answers were, but they are not what my attorney has read to me.

Q. You are advised that this record is incorporated into and made a part of the record of hearing in your case, being marked for identification "Exhibit A," and together with the evidence adduced at this hearing, will be forwarded to the Secretary of Labor, Washington, D. C., for consideration in the disposition of your case.

A. I understand.



Q. I also show you statement taken by Walter L. Wolf, Acting District Director, St. Louis, Missouri, at Hot Springs, Arkansas, September 16, 1933, and ask you if the statement that will be read to you is correctly transcribed?

(Statement read to alien by his attorney, Felix L. Smith.)

A. Some of the things that I answered on this occasion are not in this record. As to the "Daily Worker" I said I read it sometimes.

Q. You are advised that this statement will also be incorporated into this record for the consideration of the Secretary of Labor, Washington, D. C., in connection with the testimony taken at the present time, and will be marked for identification "Exhibit B"; do you understand?

A. Yes.

Q. What books of Karl Marx have you read?

A. No. 1 and No. 2 books.

Q. Have they a title?

19 A. I don't know whether they had a title—just two books by Karl Marx.

Q. Have you these books?

A. No, I disposed of them.

Q. When did you dispose of these two books?

A. In 1920, some fellow sold them to me for about \$7.50. About six months later I sold them to a different party at a profit.

Q. Did you read these books?

A. Yes, most of them.

Q. What did Karl Marx advocate in these books?

A. He was opposed to the owning of property. He believed in the Government owning everything.

Q. Did you accept his teaching at that time?

A. No, because there was too much prosperity here at that time.

Q. Do you believe in his teachings at the present time?

A. No.

Q. I show you a book issued by the Communist Party of the United States. The first page of the book reads:

Communist Party of the U. S. A.

(Section of the Communist International)

Membership Book No. 2844 for Name Joe Strecker. Date Admitted to Communist Party 11/15/32. Entered Revolutionary Movement ----- District 10 City Hot Springs, Ark. Section ----- Shop or Street Nucleus ----- Signature of Member (in ink) ----- This book issued on Jan. 3, 1933. K. Erlich. Signature of District Organizer and Party Seal.

20 No Party Membership Book Valid Unless it Has Party Seal Stamped On.

Issued by the Central Committee, C. P. U. S. A.

Q. Are you the Joe Strecker named in this book.

A. Yes.

Q. You are advised that this membership book in the Communist Party of the United States will be introduced into this evidence and marked, for identification, "Exhibit B B." Do you understand?

A. Yes.

Q. Is this book yours?

A. Yes.

Q. Are you a member of the Communist Party?

A. I was.

Q. What association fee did you pay to join the Communist Party?

A. I think 20 cents for the book, and after that I bought 60 cents in stamps.

Q. When you joined the Communist Party, did you go through any ceremony, or take any oath of allegiance to the order?

A. No, they just asked my name.

Q. Where did you join the Communist Party?

A. Here in Hot Springs. I think it was one day before the presidential election of 1932.

Q. Was the meeting held by the Communists in Hot Springs?

A. Yes.

Q. Where was that meeting held?

A. In a negro church on Grand Avenue.

Q. How did you know that a meeting would be held there?

A. I met a fellow on Cress Street, and he told me that a meeting would be held.

Q. Were you discussing Communism with him?

21 A. No; I said, what kind of meeting and he said "Come and see" and I went. I didn't think it would be a Communist meeting because it was held in a church, and the Communists don't believe in church.

Q. At this meeting how many speakers were there?

A. A woman and two men.

Q. In the speeches made at this time did any of the speakers advocate the overthrow of the Government of the United States and the establishment of a workingman's government?

A. No.

Q. What did they advocate?

A. They advocated the organization of a Communist Party so everybody could have bread and butter. They were against bosses—our bosses get all the gravy, and we don't get any of it. One of the speakers was a negro. The negro said the milk of a negro woman's breast was good for a white child to feed on.

Q. Now, you appear to read a great deal, did you know what the Communist Party stood for at that time?

A. I did not exactly know.

Q. Have you found out since?

A. I didn't know exactly at that time, but I think in 1932 I found out.

Q. Do you believe in the ownership of property by individuals?

A. Yes, sure.

Q. Do you believe in the overthrow of the Government of the United States and the establishment of a workingman's government?

A. I don't believe in the overthrow of the Government of the United States; I don't believe in the establishment of a workingman's government from a Communist standpoint.

Q. Is it not a fact that you have talked communism in Hot Springs, Arkansas?

A. No.

22 Q. Is it not a fact that you distributed or caused to be distributed anarchistic literature as testified by Mrs. Levering?

A. I was given a handful of circulars from that meeting, not more than twenty. I came home and put them on a table; the circulars stood for Communism. That was on November 4th. Mrs. Levering may have taken some. She asked me what they were; I didn't tell her; I told her it was some political things; I never told her to distribute them.

Q. Now, you receive the "Daily Worker," do you not?

A. It came to me a while, and then quit.

Q. How did it happen that you received that paper?

A. John Greenock, a roomer at my house in 1932, owed me \$10.00 room rent. He left my house to go to Pittsburg, and then sent me the paper and told me to read the paper, that I was a bourgeoisie. He meant that I owned property. I didn't subscribe to the paper; it came to me for ten months, and I read it sometimes. He said the paper was in place of the room rent he owed me.

Q. Just what do you believe in, in the way of Government?

A. I believe it is best like we have here. We have a good constitution for the people, by the people. We have a lot of grafters, as you know, that should be gotten rid of.

Attorney SMITH:

Q. Where were you, Joe, in 1917 and 1918?

A. I think I was in Illinois.

Q. What were you doing at that time?

A. In the coal mines.

Q. Did you register for the United States army service in June 1917?

A. Yes, sir.

Q. Where?

A. Orient, Illinois.

Q. Were you ever asked to go to the United States Army?

23 A. I said I was willing. I had brothers and sisters on the other side, and they told me if they needed me they would call me.

Q. Did they ever call you?

A. No.

Q. During the war did you purchase any Liberty bonds or war saving stamps?

A. Yes.

- Q. Do you know the meaning of the word "anarchist"?
- A. Yes.
- Q. What is an anarchist?
- A. Anarchist means to destroy property, to kill you, butcher you up.
- Q. Do you believe in the principles of the anarchists?
- A. No.
- Q. Did you state on direct examination that you were opposed to any organized government?
- A. I am not opposed to any government.
- Q. Have you ever been opposed to organized governments?
- A. No.
- Q. Have you knowingly encouraged the destruction of governments?
- A. No.
- Q. Are you opposed to the United States Government?
- A. No.
- Q. Have you ever been opposed to it?
- A. No.
- Q. Have you ever knowingly joined any organization the purpose of which was to destroy governments?
- A. No.
- Q. Did you know when you went to the meeting on Grand Avenue that you were going to a Communist meeting?
- A. I didn't know until I went in the church, then they told me it was a communist meeting.
- Q. Did you receive this book while there on that night (Communist membership book previously mentioned in testimony)?
- 24 A. No; I just put in my name and they sent the book to me from Kansas City.
- Q. Have you read this book through?
- A. Yes; but I don't believe it now.
- Q. Did you pay an initiation fee of 50 cents to receive this book?
- A. I don't remember the money I paid.
- Q. Did you pay an initiation fee of 50 cents for this book and 10 cents weekly dues?
- A. I paid something for the book, and bought a few stamps to put in it.
- Q. Were you employed at that time?
- A. No; I was just in the rooming house, the same place I am now.
- Q. Did you agree with what the speakers said at that meeting?
- A. Some of it was all right, and some of it wasn't—not all of it.
- Q. Did you know at the time you paid your dues you were joining the Communist Party?
- A. Yes.
- Q. Did you pay your dues to join the Communist Party or learn the things they stood for?
- A. To see the book, because I never saw one in my life.



Q. Why did you quit paying the dues to this Communist Party?

A. Because when I saw it (the book) I didn't agree with it, and I quit paying dues.

Q. Did you know if you quit paying dues for a period of four weeks that you were dropped from the organization?

A. Yes.

Q. How did you know this?

A. Because I saw it in there.

Q. Did you quit paying dues in order to drop out of this organization?

A. Yes, sir.

Q. Why did you wish to discontinue being a member of the Communist Party?

25 A. I didn't like it.

Q. Have you ever knowingly circulated, or caused to be circulated, any printed matter, the purpose of which was to overthrow or destroy the Government of the United States?

A. No.

Q. Did you not receive some literature while attending the meeting on East Grand Avenue?

A. Yes.

Q. Did you know what that literature contained at the time you received it?

A. No.

Q. What did you do with that literature?

A. Put it in my pocketbook, took it home, and threw it on my desk.

Q. How long was this before the presidential election of 1932?

A. About a day before the election.

Q. Did you read this literature closely?

A. Yes.

Q. State if you remember what was contained in this printed matter?

A. Such as "Vote Communist on the November Plank."

Q. As you now remember it, was that all that was in this literature?

A. I think it was political like all the rest.

Q. After reaching your home that night, or at any time lately, did you make any effort to conceal or hide this literature?

A. No.

Q. Did you make any effort at any time to destroy this literature?

A. No.

Q. Did you ever at any time ask anyone else to distribute this literature for you?

A. No.

Q. Did you or did you not approach a filling station man in Hot Springs and ask him to distribute some of this literature?

26 A. No.

Q. Did you or did you not ask Florence Levering to distribute this literature?

A. She told me she was going to take a few home.

Q. Have you ever had any literature of any kind in your home or in your possession that you expected to distribute, which literature sought the destruction of the United States Government?

A. No.

Q. Have you ever seen any literature at any time, or had in your possession, that advocated or taught the killing of United States Government officials or the officials of any other organized government?

A. No.

Q. Do you believe in the killing of United States Government officials simply because they are United States Government officials?

A. No.

Q. Have you ever had any literature in your possession that taught or that advocated sabotage?

A. No.

Q. Do you know what sabotage means?

A. That means when the working man works for some bosses and they want high wages and they can't get these high wages, they destroy his property.

Q. And you have never believed and don't believe now in sabotage?

A. No.

Q. Have you ever had in your possession any literature that taught the unlawful destruction of property?

A. No.

Q. Did you in 1927 make an attack on some arresting officers who came to your place on East Grand Avenue, attacking them with a knife, or any other weapon.

A. No; I didn't.

Q. Have you ever cursed officials who came to serve a warrant on you?

A. No.

27. Q. Have you ever had any difficulty with the United States Government?

A. No, never.

Q. You are now a member of the Communist Party?

A. No.

Q. Have you ever knowingly given any money or anything of value, the purpose of which was to teach the doctrines of the Communist Party?

A. No, never.

Q. Is it not a fact that you have invested some of your money in Soviet stocks and bonds?

A. Yes, both.

Q. Did you make that investment because you believed in the principles of Soviet Russia, or for the commercial returns that you might receive on your money?

A. Because I wanted to invest my money and make a profit and sell it for speculation.

Q. Was it your intention when you made this investment to forward the cause of Soviet Russia?

A. No.

Q. In your heart are you in sympathy with the Soviet Republics of Russia?

A. No; these bonds paid good dividends. I have got now about \$300.00 made on this investment alright. I will keep it until July and maybe make \$600.00 on it. I was merely speculating.

Q. Your investment was not made from any sympathy with Russia?

A. No.

Q. How long would it take you to dispose of your property in the United States, according to your best judgment?

A. One year.

Q. From your information of the Communist Party, should you be allowed to remain in the United States, do you think now that you would ever subscribe to its principles again?

A. No.

Q. When you joined the Communist Party, did you join this organization through ignorance?

28 A. I joined to find out what it meant.

Q. Did you make any effort to conceal the book showing that you are a member of this party?

A. No.

Q. Did you ever subscribe for the "Daily Worker?"

A. No.

Q. Did you ask that it be sent to you?

A. No; that man subscribed for it.

Q. Do you spend your idle time reading that type of literature?

A. No.

Q. What other newspapers do you read?

A. New York Times, St. Louis Post, the Little Rock papers, magazines, current history.

FLORENCE LEVERING, witness called, sworn, testified:

Q. What is your name?

A. Florence Levering.

Q. Are you known by any other name?

A. Yes; I am known by the name of Florence Gardner.

Q. When and where were you born?

A. Tulsa, Oklahoma. I am part Indian—Cherokee. I was born Oct. 27, 1871.

Q. Are you married or single?

A. Single.

Q. Have you ever been married?

A. I have been married twice.

Q. What was your maiden name?

A. Florence Prohall. My first marriage name was Levering; my second marriage name was Gardner.

Q. Then you are Mrs. Florence Gardner?

A. No; I never carry that name, because I married that man and I found that he had another wife.

Q. Where do you reside?

A. I live on Kay Street; there is no number out there.

29 Q. What is your occupation?

A. Anything I can get to do. For the last couple of years I have been a seamstress.

Q. Are you acquainted with one Joseph Strecker who is now present (pointing to Joseph Strecker)?

A. I sure do.

Q. Did you work for him?

A. Yes.

Q. In what capacity?

A. I ran the restaurant at 105 East Grand Avenue, Hot Springs, Arkansas.

Q. What position did you hold in the restaurant?

A. I cooked and sold short orders; I just ran the place.

Q. Is that restaurant in operation now?

A. No, sir; it has not been for about two years.

Q. How long did you work for Mr. Strecker?

A. For quite a while; I don't remember exactly how long.

Q. At the time you did work for him, did he ever talk with you on the subject of Communism?

A. No, sir; not when I worked for him.

Q. Did you ever at any time hold a conversation with him on Communism?

A. In my house, yes; I suppose you would call it that. It was in regards to the country and how things was going.

Q. Mrs. Levering, do you know what Communism is?

A. I guess I do. There is plenty I don't know at all. It is a kind of organization to be to the effect to change the laws of our country.

Q. In changing the laws of our country, do you know whether the Communists propose to do so by using force or violence, or, in other words, by a revolution?

A. I think they do.

Q. Did Joseph Strecker tell you at any time he was a Communist?

A. Yes; it was no secret at all.

Q. Mrs. Levering, did you ever get into any kind of difficulty at Newport or Batesville, Arkansas?

30 A. I was never there in my life.

Q. Mrs. Levering, were you present at the restaurant of Joseph Strecker when the restaurant was raided by the prohibition and the local police officer?

A. Absolutely.

Q. Was Joseph Strecker also present?

A. Yes, sir.



Q. It has been alleged that Joseph Strecker attacked the police officer and Government official at that time with a knife, is that true?

A. No; not that I know of.

Q. Did you attack them with a knife?

A. No; if Joe Strecker ever drew a knife it was sometime when I wasn't there.

Q. Mrs. Levering, I will read you from a statement made by Dave E. Brown of Hot Springs, Arkansas, to Mr. Walter L. Wolf, Acting District Director of Naturalization of St. Louis. This statement was made at Hot Springs, Sept. 16, 1933.

"Q. Have you ever arrested this man Strecker; if so kindly tell me the circumstances?

"A: I arrested him sometime in the year 1927 at his restaurant, located at 105 East Grand Avenue, Hot Springs, on the charge of violation of the National Prohibition Act. The officer accompanying me to make the arrest was Will Lowe, deputy sheriff of Garland County. At the time we arrested him, he was very drunk, and became very abusive to Mr. Lowe and myself. He was armed with a butcher knife, which he tried to use upon Mr. Lowe and me. We had considerable difficulty in subduing him. He was very abusive of the Government of the United States, cursing the Government and using words substantially as follows: 'To hell with the Government of the United States and everybody connected with it.' The informant in this case was a negro who had made a purchase of liquor in Strecker's place; but in the trial before the Commissioner;  
31 Strecker produced witnesses who swore that they were present at the time this negro came into Strecker's place, and that the negro had not bought the liquor." Is this true?

A. To my knowledge he never used a butcher knife in resisting arrest; if he did I wasn't present.

Q. Did you ever hear Joseph Strecker say that he thought the president of the United States or any other official of this Government should be assassinated?

A. No; I don't think I have heard him say anything like that, but I have heard him say they were all grafters. Sometimes he would lose money, and while he was mad he would say almost anything. You know, when a man is mad he will say most anything he don't mean.

Q. Did you ever hear Joe Strecker offer any suggestion as to what should be done to correct the conditions existing in this country?

A. I don't remember what he has said in regards to it.

Q. Did he ever advocate the correction of conditions by revolution?

A. He has talked in regards to that, that he thought there would be one before the country would be any better than it was.

Q. Did he ever make a statement that if a revolution came he would participate in the revolution?

A. Yes.

Q. Do you recall just what he said in that regard?

A. I don't remember just what he would say. Different times he would talk in different ways, and it would be hard to explain.

Q. Mrs. Levering, what would you say as to Joseph Strecker's reputation in a general way?

A. He used to be pretty rough when he was drunk.

Q. Was he a law violator?

A. I don't know whether you would call it a law violator or not.

Q. When you say he was rough, do you mean that he used abusive language, or that he fought, or just what did he do?

32 A. I never knew him to fight anybody. He used abusive language when he was drunk.

Q. Do you know whether Joseph Strecker is now or was a member of the Communist party in the United States?

A. I don't know whether he belongs to it or not.

Q. Do you know whether he ever belonged to it?

A. I never seen any papers.

Q. Was a Communist meeting ever held at his restaurant?

A. No, sir.

By Attorney FELIX L. SMITH:

A. To refresh your mind a bit, Florence, you stated on direct examination that you didn't know exactly how long you worked for Joseph Strecker?

A. I believe it was about three years.

Q. I want to ask you, during what three years was it you worked for Joseph Strecker?

A. I just don't remember—it was about '26 or '27.

Q. Could you be exact as to these years?

A. No; I couldn't.

Q. About when was it?

A. It has been about four years ago since I quit working for him when he sold the restaurant.

Q. Then you would say it was in 1927, '28, or '29, would you not?

A. I suppose so; it has been about four years since he sold the restaurant, when I quit working for him.

Q. I don't want to embarrass you, Florence, but do you read and write?

A. No.

Q. Then all you know about Joe's business is what he told you?

A. What he has told me.

Q. But during the years you worked with Joe, I will ask you whether or not he did tell you most of his business?

A. Yes; he talked a great deal of it.

33 Q. During the time you worked for Joe, he never told you at any time about belonging to a Communist organization?

A. Never did, while I was working for him; no.

Q. During that three years did your granddaughter stay with you?

A. No, just part of the time; just about six months. She came in July, and Joe sold out the restaurant two or three weeks after Christmas.

Q. During that six months your granddaughter did most of your letter writing for you?

A. She did all of it.

Q. And during that six months, did that granddaughter have access to Joe's room and Joe's papers?

A. No, sir.

Q. Had there been any papers there of a communistic nature, would she have likely found them or read them?

A. There was no such papers there when he was at my house.

Q. I will ask you whether or not your granddaughter ever told you she found any literature there?

A. She never did.

Q. Were you present in the cafe on Grand Avenue—at 105 East Grand Avenue, when Dave Brown and Will Lowe raided Joe Strecker's house?

A. Yes.

Q. You positively know you were present when they raided the place?

A. Several times I was present when they raided it, and there were several times when I wasn't present when they raided it.

Q. How many times were you present whenever they raided it?

A. Am not certain; two or three times, though.

Q. But you are positive that you were present on two or three occasions when Dave Brown raided it?

A. Yes.

Q. Are you absolutely positive that he raided it more than two times?

34 A. All I know is what they told me. I was sick once, and they told me they raided the place when I was sick,

Q. What do you mean by "they"?

A. The officers. I don't just now remember what officers; anyhow Joe told me they raided him.

Q. Are you absolutely positive that on occasions when you were present, and they raided the place, that Joe Strecker made no attempt to cut the officers with a knife or do bodily harm?

A. No, sir; not that I see.

Q. Did Joe Strecker ever tell you he made an attack on them when you were not present?

A. No.

Q. Were you present on the occasion when Mr. Brown and Mr. Lowe raided the place, at which time Joe Strecker was drinking or drunk?

A. He might have been drinking; but not drunk, because when Joe got drunk he crawled off in a corner and stayed there until he slept it off.

Q. Do you recall any specific time in 1927 when these officers raided the place when Joe was unusually drunk?

A. No, because Joe was not unusually drunk when I was there. The particular time they claim he used the knife, that was one morning.

Q. Explain just what you mean?

A. It might have been in the afternoon; I can't say what time it was; it was too early for Joe to fill up. There was never nothing to the knife that I know anything about.

Q. At that time were you cutting bread or cutting meat?

A. Yes, I had a knife in my hand.

Q. Did you or did you not point that knife and tell the officers to sit down?

A. No, I told them not to come in the kitchen. I was there with the knife cutting bread, and I told them not to come into the kitchen because there was nothing in there. I told them not to search the place until I sent for Joe. Joe wasn't in the restaurant at that time.

35 Dave Brown walked to a chair near the kitchen and sat down as I told him.

Q. Did you point to Brown with the knife?

A. No.

Q. Was this the occasion when they attempted to search Joe Strecker?

A. Yes.

Q. Did you on that occasion tell them or order them not to search Joe?

A. No; that was when they wanted to search Joe for a marked dollar.

Q. When was that?

A. I guess that was the last time they arrested him; I couldn't say.

Q. Do you know who the officers were on that occasion?

A. Will Lowe and Dave Brown.

Q. Then on that occasion did you or did you not have a knife in your hand?

A. I was making hamburgers; I might have been cutting bread, but I never drew it on the officers.

Q. On this occasion did you tell them not to search Joe in the cafe?

A. Certainly did.

Q. Did they search him in the cafe?

A. No; they didn't.

Q. You don't recall whether on that occasion you had a knife cutting hamburgers or not, do you?

A. No.

Q. You were asked on direct examination if Joe ever told you he believed in Communism, to which question you answered, "It was no secret," is that right?

A. Correct.

Q. I will ask you to state the name of any party or parties that have on any occasion informed you that Joe Strecker believed in Communism?

A. You want me to state the names?

Q. Yes.



36 A. A good many people I know claims he is one; Charlie Juneau, for one; he is a grocery man who lives right across the street from 105 East Grand Avenue.

Q. Do you know the names of any other parties who told you Joe believed in Communism?

A. I don't know whether they said he believed in it, but they said he was always talking it to them. Well, Henry Ellis, he is a carpenter who lives on Grand Ave.

Q. I will ask you to state if you can the date they told you and the occasion?

A. I can't say; it was two or three weeks ago he had seen Joe up-town. He said Joe was talking to a fellow on that Communism.

Q. Do you know of any other party that ever told you Joe believed in Communism?

A. Well, most everybody in town thinks he is one.

Q. Can you name any other party that has told you Joe Strecker believes in Communism?

A. Not at the present time. It is hard to call to mind any person at this time.

Q. I will ask you if Charles Juneau has not been in business near where Joe Strecker was?

A. Yes; right across the street.

Q. I will also ask you if you know what the nationality of Charles Juneau is?

A. I don't know; they call him a dago, but I don't know whether he is or not.

Q. I will ask you whether or not you know that Charles Juneau and Joe Strecker differed on many political questions?

A. Yes.

Q. I will also ask you if it is not a fact that Charles Juneau was not in competition with Joe in some lines?

A. Yes.

Q. State whether or not you have heard Charles Juneau say he didn't like Joe Strecker.

A. I have heard him say he didn't like him plenty of times.

37 Q. Do you know where Henry Ellis was born?

A. In Hot Springs.

Q. What occupation does Mr. Ellis follow?

A. He is a carpenter.

Q. Did you ever hear him say whether or not he liked Joe Strecker?

A. No, he always claimed he liked Joe. He said he never had anything in particular against him.

Q. During the three years you worked for Mr. Strecker, did he tell you he believed in Communism?

A. No, not when I worked for him; no, I don't think there is ever a question of such a conversation when I worked for him.

Q. All that you know of Joe's being a Communist is from what someone else told you?

A. Only what he told me himself.

Q. How do you arrive at the answer, "It was no secret" he was a Communist?

A. Well, because he talked it to anybody.

Q. Did he talk it in the cafe?

A. Not when I worked for him and he had that cafe. It was all since he sold out the restaurant in the last year or two.

Q. How closely associated have you been with Joe Strecker?

A. I would say maybe once or twice a week, sometimes oftener than that, I slept with him.

Q. Where would you usually see Joe?

A. I usually went to his house on Sunday and cooked dinner for him.

Q. And you can only name two persons that told you he believed in Communism?

A. I have heard lots of people say he was, but as to remembering their names, I can't exactly recall just who they were; I couldn't mention their names now.

Q. When were you last in the home of Joe Strecker?

A. It was along about this time last year.

38 Q. Then during the past year your acquaintance with Joe Strecker has been seeing him on the street?

A. About three times in the last year, and then I saw him on the street.

Q. At these three meetings, what was the usual conversation?

A. We never even passed the time of the day. I have not talked with him. I usually seen him at a distance.

Q. Then what you know about Joe Strecker is belief?

A. Well, what he has not told me himself.

Q. Did you ever know of Joe Strecker being indicted for any crime?

A. No, if he was I didn't know it.

Q. Have you known of Joe Strecker's being arrested for any crime during the past three years?

A. No, sir.

Q. Is it not a fact that Joe Strecker seems to be leading a more sober life now than he was four years ago?

A. Yes; if he has taken a drink in four years but a couple of times, I don't know it.

Q. And on these occasions, he didn't get drunk, did he?

A. No, sir; he would take a little swallow of it and say, "I don't want it."

Q. So far as you know, Joe Strecker is well known in the town of Hot Springs, is he not?

A. Yes.

Q. How long have you lived here?

A. About thirty-five years.

Q. Is it not a fact that the reputation of Joe Strecker among most people is good?

A. It might be.

Q. Is it not a fact that Joe Strecker's reputation among the American people in Hot Springs is good?

A. I can't say, I never lived with him.

Q. You have worked for the man around the cafe, and you should know what his reputation is.

A. I rather think he has a good reputation.

39 Q. During the years that you were most closely associated with Joe Strecker, is it not a fact that Joe Strecker lent money to a lot of American citizens of Hot Springs?

A. He sure did.

Q. Is it not a fact that he was good in lending money to the people in need?

A. Yes; he was extraordinary good in that; and he would be very lenient in making them pay interest.

Q. And you know that from your own personal knowledge?

A. Yes; and there is one thing, if Joe owes you a dollar, Joe will pay his debts.

Q. Did you ever on any occasion know of Joe Strecker attacking any person, an officer or otherwise, with a knife or any deadly weapon?

A. Never in my life; nobody.

Q. Has his talk to you ever been that he believed in doing bodily harm or injury to any person?

A. No.

Q. I will ask you whether or not Joe Strecker in 1928 loyally advocated the election of Al. Smith for president?

A. I think he did; he was for Smith.

Q. I believe you stated you never knew of Joe Strecker belonging to any Communist organization?

A. No, sir; if he did I never know it.

Q. And I believe you stated he believed in bettering the laws of this country?

A. Yes.

Q. Did he advocate lawful means of making changes in the Government?

A. Well, I don't know.

Q. But it is a fact that during the present depression he has made a better citizen than he was before, in your opinion?

A. Well, I don't know. I think yes, in a way. Yes; he has quit his drinking, and he don't drink and associate with those old drunken associates.

40 Q. Did you ever hear on any of the occasions when Mr. Brown and Mr. Lowe raided the place on East Grand Avenue any such language used as Mr. Dave Brown stated was used by Joe Strecker?

A. No; Joe never abused the officer at any time.

Q. On any of these occasions, did you ever hear Joe Strecker curse officers or say "to hell with the United States Government?"

A. No.

Q. Had such language ever been used, would you likely heard it?

A. I think so; when I was there. Joe never abused them officers any time when I was there.

Q. Did you ever hear Joe Strecker say "to hell with the United States Government?"

A. Yes.

Q. Was he sober and in a good humor when he said it?

A. No; he was usually mad.

Q. You don't especially like or dislike Joe Strecker?

A. No; I don't dislike Joe.

Q. Do you get along with Joe as well now as you used to?

A. He stays on Magnolia Street, and I stay on Kay Avenue. I think I seen him on the street a week or two before Thanksgiving.

Inspector VINCENT:

Q. It has been alleged that Joe gave you certain pamphlets or circulars pertaining to the Communist Party to distribute around the city of Hot Springs, is that true?

A. Yes.

Q. Have you one of these circulars?

A. No.

Q. Do you know what was in the handbill or circular?

A. No.

Q. How do you know it was a Communistic bill?

A. Because my granddaughter read one of them and told me.

41 Q. When was that?

A. It was in the fall, before the presidential election. It might have been two or three months.

Q. What kind of bill was that handbill?

A. It was a plain sheet of paper. My daughter just told me it was soapbox literature.

Q. Did you distribute any of these handbills?

A. No, sir, I didn't.

Q. Did Joe ask you to distribute them?

A. Yes.

Q. What did he tell you?

A. He told me to be sure and put them bills out at night, and if I didn't want, then to get some negro boys to do it for me.

Q. What became of these handbills?

A. I burnt them up.

Attorney SMITH:

Q. Are you sure that was as much as three months before the presidential election?

A. It was in the fall before the presidential election. I was ailing, and I most forgot I was living.

Q. Do you know of any other political literature being distributed in Hot Springs?

A. If I did, I don't remember it.

Q. Did you have any knowledge at that time of a man named Foster running for President of the United States?

A. Yes, I heard a lot of people talk about him running for President of the United States.

Q. Have you heard the name of any other candidate that ran in that election?

A. No.

Q. To refresh your memory, didn't you tell me you had knowledge of another candidate running for president?

A. Well, there was two of them, but I never tried to keep their names in mind.

Q. Is it your opinion, then, that Foster was the Communist candidate for President?

A. Yes.

42 Q. Is it not a fact also, that you knew then, or have since learned, that there was another candidate on the Communist ticket for President?

A. There might have been; I think they told me there was two that was running. A colored fellow and a white fellow—I believe Ford was the name.

Q. Were you informed at that time what political party Ford represented in the race for President?

A. No.

Q. Did you not understand there was a negro running for President on the Communist ticket?

A. Yes.

Q. Did you know in that election whether Joe Strecker was supporting Foster or Ford?

A. Well, he talked about him all the time—a great deal.

Q. Did you know which of the two candidates he supported, if either?

A. No, I don't.

Q. Do you know whether or not in the Presidential election he supported any Communist for President?

A. No.

Q. Were you paid or offered anything to distribute the literature that has been mentioned?

A. No.

Q. You didn't read the literature?

A. No.

Q. You don't know what was printed on it?

A. No.

LOUIS BENEDICT called, sworn, testified:

By Attorney FELIX L. SMITH:

Q. What is your name?

A. Louis Benedict.

Q. Where do you live?

A. 919 Malvern Avenue, Hot Springs, Arkansas.



Q. You are a citizen, property holder, and voter of Hot Springs, are you not?

43 A. Yes, sir.

Q. How long have you lived in Hot Springs, Arkansas, Mr. Benedict?

A. Since 1888.

Q. Have you lived here continuously since 1888?

A. Practically so.

Q. What is your occupation?

A. Baker.

Q. Are you acquainted with Mr. Joe Strecker, who is present?

A. Yes, sir; since 1918.

Q. I will ask you to state whether or not you are acquainted with his reputation as a citizen of Hot Springs since that time?

A. Yes; in fact, all the time.

Q. Would you say that you are intimately acquainted with the man?

A. Yes, sir.

Q. I will ask you, Mr. Benedict, to state to the Inspector, what in your opinion is the general reputation of Joe Strecker as a law-abiding citizen of the city of Hot Springs since 1918?

A. His reputation is very good; in fact, he has a great many friends.

Q. I will ask you to state whether or not if you were a regular caller in the cafe of Joe Strecker during the time he was at East Grand Avenue?

A. I was. I furnished bakery goods.

Q. About how often did you call at his place of business at that time?

A. Twice every day.

Q. I will ask you to state if at any time that you called on Joe Strecker at his place of business, that the man ever indicated to you that he was interested or belonged or believed in the Communist theory?

A. He never did. I might say it was quite a surprise to me when I went with him to Little Rock to get his citizenship paper he was refused. In fact, I couldn't understand why.

44 Q. How often would you say you have seen Joe Strecker on an average, during the years you have known him?

A. Every day; you might make it most every day, because since I am out of business I have not seen him as regularly as when I was in business, and he was in business. On the streets I met him practically every day.

Q. I will also ask you to state from your knowledge and information of the man, if it is common knowledge Joe Strecker is known as a Communist?

A. No; nobody ever told me he was a Communist; nobody talked to me about it.

The following passport data was furnished:

Name: Joseph George Strecker.

Age: 45.

Date of Birth: August 28, 1888.

Place of Birth: Kamionka, Strumilowa No. 12, Poland.

Father's name and place of birth: Jacob Strecker, Kamionka, Strumilowa, Austria, dec'd.

Mother's name and place of birth: Dorothy Burgens, Radochow, Austria, deceased.

Names and addresses of relatives abroad: Son—Joseph Simon Strecker, Kamionka, Strumilowa No. 12, Poland.

Names and address of wife: Sofia Zinko, Kamionka, Strumilowa No. 12, Poland.

Names and locations of foreign schools attended: Public School, Kamionka, Strumilowa, Poland.

Names and locations of foreign churches attended: Catholic Church, Kamionka, Strumilowa, Poland.

Where baptized: Same place.

Date of Baptism: In infancy.

Personal description: Height 5' 8". Weight 150 lbs. Eyes brown. Hair brown. Face oval. Nose large. Mouth average. Distinctive marks: Right middle finger injured.

45

Inspector VINCENT to JOSEPH STRECKER:

Q. You are advised that under the Act approved October 16, 1918, as amended by the Act approved June 5, 1920, Section 3, that if you are deported from the United States, and thereafter you enter or attempt to enter the United States, you will be deemed guilty of a felony, and upon conviction be liable to imprisonment for a term of not more than five years, and upon termination of such imprisonment be taken into custody on warrant of deportation, as provided in the Immigration Act of June 5, 1920, do you understand?

A. Yes.

### Summary

From the evidence adduced at this hearing, it appears that Joseph Strecker first entered the United States November 7, 1912, at New York, N. Y., ex S. S. "Bremen" and has remained in the United States since that time. It appears that about November 3, 1932, he became a member of the Communist Party, and accepted certain Communistic literature for distribution, at that time. His membership book is incorporated in the evidence, but not the circular that he caused to be distributed. On two former occasions he admitted to Government officers that he was a Communist, and believes in the Communist doctrines. At this hearing he admits that he has been a Communist, but denies being in or belonging to the order at the present time. It is believed that the charges in the warrant of arrest have been sustained by the evidence.

## Recommendation

46 Deportation to Austria, the alien's native country, at the expense of the Immigration appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1934."

(Sgd.) ISAAC H. VINCENT,

*Immigrant Inspector, Examining Officer.*

I certify that the foregoing is a true and correct transcript of the record of hearing in this case.

(Sgd.) ISAAC H. VINCENT,

*Stenographer.*

*Exhibit 3 being testimony of Joseph Strecker taken on October 25, 1933, in office of Chief of Police, Hot Springs, Ark., before Immigrant Inspector Carroll D. Paul.*

Statement of Joseph Strecker alias Joe Strecker held at the office of the Chief of Police, Hot Springs, Ark., before Immigrant Inspector Carroll D. Paul, on October 25, 1933.

Present: Carroll D. Paul, Examining Officer and Secretary. L. A. Cooper, Capt. of Police, Hot Springs, Ark. Luther Morgan, Officer Police, Hot Springs, Ark. Examining Officer, addressing Joseph Strecker, alias Joe Strecker.

You are advised that I am an Inspector, United States Immigration and Naturalization Service and that I desire a statement from you relative to your right to be and remain in the United States; such statement, if made, must be entirely voluntary on your  
47 part and may be used against you in any subsequent criminal or other proceedings.

Q. Are you ready and willing to make such a statement under oath?

A. Yes.

JOSEPH STRECKER alias JOE STRECKER, having been duly sworn, testified in the English language as follows:

Q. What is your name?

A. Joseph Strecker.

Q. Have you ever been known by any other name?

A. Yes; I am known here as Joe Strecker.

Q. What is your age and occupation?

A. I am 45 years of age and my latest occupation was restaurant operator.

Q. When and where were you born?

A. I was born on August 28, 1888, at Kamionka Strum, Province of Galicia, Austria.

Q. What is your race and nationality?

A. German race and Austrian nationality.

Q. Are you married or single?

A. I am married.



Q. When, where, and to whom are you married?

A. Some time in 1910, at Kamionka, Strum, Austria, to Sofia Zenko.

Q. Where is your wife at this time?

A. She is in Austria.

Q. Has she ever resided in the United States?

A. No.

Q. Have you any children?

A. I have one son, Joseph Strecker, born in Kamionka, Strum, Austria, in 1912.

Q. State your father's name and nationality?

A. Jacob Strecker, a citizen of Austria.

Q. Did he ever to your knowledge become naturalized as a citizen of any other country?

A. No.

48 Q. State your mother's maiden name and nationality?

A. Dorotea Burger, a citizen of Austria.

Q. Where were your parents born?

A. Both born in Austria.

Q. When and where did you last enter the United States?

A. On November 7, 1912, at New York, N. Y.

Q. What was your destination at that time?

A. I was enroute to the coal fields of Penna.

Q. What was your purpose in entering the United States?

A. To reside.

Q. Were you inspected and duly admitted to the United States by an Immigrant Inspector at that time?

A. Yes.

Q. Are you now in possession of a passport?

A. No.

Q. Do you have a birth certificate?

A. No.

Q. Have you ever been departed, excluded, or permitted to depart voluntarily from the United States in lieu of deportation by Immigration authorities?

A. No.

Q. Have you ever resided in the United States prior to your last entry?

A. No.

Q. Have you ever been arrested or convicted for the commission of a felony or other crime or misdemeanor?

A. I was arrested in 1926, charged with selling whiskey, but was not convicted, and I paid a fine of \$10.00 for having sexual relations with one Florence Gardner, and was arrested for selling cigarettes without tax stamp, but was not convicted on that charge.

Q. In your hearing before the Naturalization Examiner you stated that you had lived with a woman named Florence Gardner as your wife; will you state the period during which you lived with her?

A. Yes; from about 1926 to 1932.

49 Q. Was Florence Gardner a prostitute?

A. Not while I lived with her.

Q. Did you know that she was a prostitute prior to the time you commenced living with her, and that she practiced prostitution during a period of several years?

A. I had heard that.

Q. Are you living with a woman at this time?

A. No.

Q. Have you any relatives in the United States?

A. No.

Q. Do you own any property in the United States?

A. Yes.

Q. What does your property consist of and what is the approximate value of it?

A. A house located at 213 Magnolia St., Hot Springs, value about \$1,700.00; a farm 32 miles out from Hot Springs, value about \$300.00; a mortgage on another farm in the amount of \$1,000.00; and some stocks and bonds.

Q. Are you a member of any organization or society, social, fraternal, or political?

A. I was a member of the Communist Party of America.

Q. What do you mean, "you were a member of the Communist Party of America"?

A. Well, I haven't paid my dues since February 1933.

Q. Have you notified the organization that you were withdrawing from it?

A. No.

Q. Have you had a change of heart or mind in the matter, or have you simply failed to pay your dues?

A. Just failed to pay my dues.

Q. Then you still feel the same as you did at the time of your initiation?

A. Yes.

Q. Have you ever become a member of any organization without first acquainting yourself with its intents and purposes?

A. No.

50 Q. Is this your membership book in the Communist Party of the U. S.? (Presenting Membership book No. 2844 issued 11/15/32 to Joe Strecker.)

A. Yes.

Q. Were you at the time of your initiation into the Communist party familiar with its intents and purposes?

A. Yes.

Q. How did you acquire this prior knowledge of Communism?

A. From a study of the writings of Marx.

Q. How long have you studied the writings of Marx?

A. About 10 years.

Q. Are you in accord with Marx in regard to the social order of things?

A. Yes.

Q. Will you tell me what the aims and purposes of the Communist Party of America are?

A. Yes; it proposes to destroy capitalism and establish a Government by the people.

Q. Do you mean a Government similar to that now in existence in Russia?

A. Exactly.

Q. What means will the Communist Party of America use to attain its purpose?

A. I do not know what will be necessary.

Q. Will it resort to armed force in the event that should be necessary?

A. That is what they say.

Q. Who says that?

A. The leaders of Communism.

Q. Do you mean the local leaders, the national leaders, or those in Russia?

A. All of them.

Q. Do you think that the present form of Government in the United States should be destroyed and a Communistic or Russian form of Government establish in the United States?

A. I think that the destruction of capitalism is inevitable and that the sooner it comes the better off we shall all be.

51 Q. Would you personally bear arms against the present U. S. Government?

A. Not at this time.

Q. Why not at this time?

A. Because Communism is not strong enough now.

Q. Supposing that the majority of the populace of the United States were Communists, and were certain of a victory over Capitalism in an armed conflict, would you then personally bear arms against the present Government?

A. Certainly; I would be a fool to get myself killed fighting for Capitalism.

Q. Have you ever been in the military service of any country?

A. No.

Q. Have you done any work for the Communist Party since becoming a member?

A. All I have done was to hand out some papers.

Q. Where did you obtain these papers?

A. From the headquarters in Kansas City.

Q. What was the nature of this literature?

A. It was something calling upon the people to unite.

Q. To unite for what?

A. Against Capitalism.

Q. When you speak of Capitalism, do you mean the present Government of the United States?

A. It is all the same thing.

Q. Did you circulate this literature that was sent you?

A. I gave it to some other people to circulate.

Q. Will you name them?

A. I have forgotten who it was.

Q. What was your purpose in filing your petition for citizenship in the U. S.?

A. I thought I would have more protection if I was a citizen of the United States.

Q. Protection from what?

A. From the law.

52 Q. Do you mean that Section of the law which provides for the deportation of certain aliens?

A. I did not say that.

Q. Isn't it a fact that your party leader advised you not to become too active in that you might be subject to deportation from the United States?

A. Something like that.

Q. Is that the reason you stopped paying your dues?

A. No.

Q. In the event the Communist party of America attains sufficient power or proportion to be of service to you, will you pay up your back dues and go along with them?

A. Certainly.

Q. What is the name and address of your nearest relative in Austria?

A. My wife, Sofia Strecker, Kamionka Strum, Austria.

Q. Have you any further statement to make?

A. No.

I hereby certify that the foregoing is a true and correct transcript of the record of hearing in this case.

(Signed) CARROLL D. PAUL,  
Examining Officer & Secretary.

File No. 584/309.

*Exhibit marked "Govt. 4," being membership book in name of Joe Strecker of the Communist Party of the U. S. A.*

Filed Jun. 21, 1937

Communist Party of the U. S. A.

(Section of the Communist International.)

Membership Book No. 2844 for

53 Name—Joe Strecker. Date Admitted to Communist Party—  
11/15/32. Entered Revolutionary Movement— District 10, City Hot Springs, Ark. Section Shop or



Street Nucleus \_\_\_\_\_ Signature of Member (in ink) \_\_\_\_\_ This  
Book was issued on Jan. 3, 1933 (Date).

(Signed) K. ERICH,

*Signature of District Organizer and Party Seal.*

(Initiation Stamp M. W.)

Stamped on Face in Purple Double Lined Circle: Workers of the  
World United. District 40. K. C. MO. Communist Party U. S. A.  
No Party Membership Book Valid Unless It Has Party Seal Stamped  
On. Issued by the Central Committee, C. P. U. S. A. Extracts From  
the Statutes of the Communist Party of the U. S. A.

### § 3—Membership

1. A member of the Party can be every person from the age of  
eighteen up who accepts the program and statutes of the Communist  
International and the Communist Party of the U. S. A., who becomes  
a member of a basic organization of the Party, who is active in this  
organization, who subordinates himself to all decisions of the Comin-  
tern and of the Party, and regularly pays his membership dues.

54 4. Members who change their place of work or in case they  
are members of a street nucleus, their place of residence, must  
secure a transfer card from the Party unit in which they have held  
membership and must present this card to the unit to which they have  
been transferred. A duplicate of the transfer card given the member  
shall be sent to the leading committee of the territorial section from  
which the member transfers and transmitted by this committee to the  
territorial section to which the member transfers.

If the member transfers from one section to another, the transfer  
card shall be transmitted thru the D. C.; if the member transfers from  
one district to another, the transfer card shall be sent thru the CC.  
Transfers from one district to another shall be entered in the Mem-  
bership Book of the Member.

6. Every member of the Party who is eligible to be a member of a  
trade union must become a member of the union to which he is eligible.

### § 4—The Structure of the Party

1. The Communist Party, like all sections of the Comintern, is built  
upon the principle of democratic centralization. These principles  
are: \* \* \*

(a) Election of the subordinate as well as the upper Party organs at  
general meetings of the Party Members, conferences and conventions  
of the Party.

(b) Regular reporting of the Party Committees to their con-  
stituents.

(c) Acceptances and carrying out of the decisions of the higher  
Party committees by the lower Strict Party discipline, and immediate  
and exact applications of the decisions of the Executive Committee of



the Communist International and of the Central Committee of the Party.

55 (d) Any Party Committee whose activities extend over a certain area is considered superior to those Party organization whose activity is limited only to certain parts of this area.

(e) The discussion on basic Party questions or general Party lines can be carried on by the members only until the Central Committee has decided them. After a decision has been adopted at the congress of the Comintern, the Party convention, or by the leading Party committee, it must be carried out unconditionally, even if some of the members or some of the local organization are not in agreement with the decision.

2. The highest authority of each unit of the Party is the general meeting of Party members, conference or Party convention.

3. The membership meeting, conference or Party Convention elects the leading committee which acts as the leading Party organ in the interim between the membership meetings, conferences or conventions and conducts the work of the Party organization.

(Continued on Page 14.) Membership Dues for 1933.

Under the Month of January are affixed four adhesive stamps in blue color worded and designed, viz:

Dues Stamp: Communist Party. (Emblem of Sickle & Hammer) of the U. S. A. 10¢.

56 Under the Month of February are affixed two blue adhesive stamps worded and designed, viz:

Dues Stamp. Communist Party. (Emblem of Sickle & Hammer) of the U. S. A. 10¢.

(The spaces for the months of March through December, are blank and do not have any stamps attached.)

Thereafter follows a double page, entitled Membership Dues for 1934, listing the months of January through December, on which page all spaces are blank and no stamps or writing appears thereon.

Thereafter follows four blank pages entitled Assessment Stamps, no stamps or other writing appearing thereon.

#### Transfers

Granted from

Accepted to

City	_____	City	_____
District	_____	District	_____
Date	_____	Date	_____
{SEAL}	_____	{SEAL}	_____
	District Organizer.		District Organizer.

Thereafter follows 10 additional blank spaces imprinted as above.

57

## § 5—The Party Nucleus

1. The basis of the Party organization is the nucleus (in factories, mines, shops, etc.), which all Party Members working in these places must join. The nucleus consists of at least three members. Newly organized nuclei must be enforced by the leading committee of the Section in which the shop nuclei are organized.

3. Party members who cannot be immediately affiliated with a shop nucleus shall join temporarily the street nucleus in the Section of the City in which they reside, until it shall be possible to create a shop nucleus in the factory.

## § 12—Party Discipline

1. The strictest Party discipline is the most solemn duty of all Party members and all party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made.

## § 13—Party Dues

1. Each applicant for membership shall pay an initiation fee of 50¢ (Unemployed 10¢) which shall be receipted for by an Initiation Stamp furnished by the CC. Fifty percent of the sum of the Initiation Stamp shall go to the National Office and 50% to the District Office.

2. Each member shall pay dues weekly approximating 2% of his earnings, which shall be receipted for by dues stamps issues by the Central Committee. Dues Stamps shall be issued in five categories, as follows:

All members receiving

\$15 per week wages or less (including housewives and working farmers) pay 10¢ dues weekly.

Over \$15 and up to \$25 per week wages shall pay 25¢ dues weekly.

Over \$25 and up to \$30 per week wages shall pay 50¢ dues weekly.

Over \$30 and up to \$40 per week wages shall pay 75¢ dues weekly.

Over \$40 and up to \$50 per week wages shall pay \$1.00 dues weekly.

Members receiving over \$50 per week wages, shall pay in addition to the regular \$1.00 per week dues, additional dues (special tax) at the rate of 50¢ for each \$5.00 (or fraction) of their weekly earnings above \$50.00.

3. The district organization shall purchase all dues stamps at 50% retail price; the district shall sell at 80% retail price to Section; and the Sections shall sell them at 90% retail price to units.

4. All local or district assessments or collections are prohibited except by special permission of the Polcom. Special assessments may be levied by the national convention or the CC. No member shall be

considered in good standing unless he purchases such special assessment stamps.

5. Members unable to pay regular dues on account of unemployment, strikes, illness, or similar reason shall pay 2 cents per week
- 59 6. Members who are four weeks in arrears in payment of dues cease to be members of the party in good standing. Members who are three months in arrears shall be stricken from the rolls. No member of the Party shall pay dues in advance for a period of more than six weeks.

### What is the Communist Party?

The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.)

We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party. (Lenin.)

### On Discipline

He who weakens, no matter how little, the iron discipline of the Party of the proletariat (especially during the period of dictatorship) effectually helps the bourgeoisie against the proletariat. (Lenin).

The Party as the best training school for working class leaders, is the only organization competent, in virtue of its experience and authority to centralize the leadership of the proletarian struggle and thus to transform all non-Party working class organizations into accessory organs and connecting belts linking up the Party with the working class as a whole. (Lenin).

60 *Exhibit 5 being hearing before Walter L. Wolf, Acting District Director of Naturalization*

STATE OF ARKANSAS,  
County of Garland, ss.

In the Matter of Petition for Naturalization of Joe Strecker No. 692, In the United States District Court at Little Rock, Arkansas

Persons present in the office of Mr. Houston Emory, Citizens Building, Hot Springs, Arkansas: Joe Strecker, Curtis L. Ridgway,

Assistant Prosecuting Attorney for Garland County, Ark., and Walter L. Wolf, Acting District Director of Naturalization, St. Louis, Mo.

Examination by Mr. Wolf:

Q. Mr. Strecker, you have appeared at this office voluntarily and you are informed that I am a representative of the United States Government in connection with Naturalization matters. I desire to question you concerning certain facts and circumstances in connection with your pending petition for naturalization in the United States District Court at Little Rock, Arkansas, which was filed by you on March 1, 1933. Are you willing to make full, true and correct statements to such questions as I may propound to you, with full knowledge on your part that your response to such questions may be used against you by the Government in any way it may see fit?

A. Yes, I am willing to make such a statement with that understanding. I will tell you all the truth about myself.

Q. Please state your full name, the date of your birth, the place of your birth, the approximate date, place and manner of your arrival in the United States, and your present place of residence?

61 A. My full name is Joseph Strecker, but I usually use the name of Joe Strecker for convenience. I was born at Kamionka, Sturm, Austria, on August 28, 1888. I arrived in the United States at the port of New York on November 7, 1912, on the vessel "Bremen." I now reside at 213 Magnolia Street, Hot Springs, Arkansas.

Q. Have you ever been absent from the United States since your arrival in this country on Nov. 7, 1912?

A. No; I have never been away from the United States since the date mentioned.

Q. Where have you lived since your arrival in the United States?

A. I first lived at Monassen, Pennsylvania, remaining there until June 1913; then I went to Bentleyville, Pennsylvania, where I stayed until March 1914; then to Wheeling, West Virginia, for two months; I then returned to Bentleyville, Pa., where I lived until the fall of 1916, when I removed to Viegler, Illinois. I lived in Ziegler until May 1917, when I removed to Orient, Illinois. I lived in Orient until May 15, 1918, when I removed to Hot Springs, Arkansas, at which place I have lived ever since.

Q. What is your business?

A. I have not been employed since June 1930, on account of poor health. Just before I quit work I had my own restaurant for over five years, the same being located at 105 East Grand Avenue, Hot Springs. Before going into business for myself, I was employed in a restaurant owned by Nick Nixon at 112 Malvern Avenue. I worked for Nick Nixon three years. Before working for Nick Nixon I was employed in a restaurant operated by Jim Fotio, for whom I



worked about six or seven months. For over two years I was laid up with rheumatism so that I could not work at all.

Q. I notice, Mr. Strecker, that in your petition for naturalization you have made the statement under oath that you are married; that your wife's name is Sophia; that you were married to her in  
62 June 1911, Kamionka Strum, Austria, and that she has never come to the United States. You also allege in your petition for naturalization that you have a child, Joseph Strecker, who was born at Kamionka, Austria, on October 15, 1912, and that he still lives at Kamionka, Austria. Are these statements of your petition correct?

A. Yes; those statements are correct.

Q. Have you ever made any effort to bring your wife and child to the United States?

A. Yes; I have asked her several times to come to the United States, but she has refused to do so. She was living with her mother until her mother dies sometime in 1925. My boy is now married and lives near Kamionka, Austria.

Q. Mr. Strecker, in your application to the St. Louis office of the Naturalization Service to file your petition, you named as your proposed witnesses, Louis Benedict, and Florence Gardner. How long have you known Louis Benedict?

A. I have known Louie Benedict since 1918. He at one time had a bakery in Hot Springs on Grand Avenue.

Q. How long have you known Florence Gardner, the other witness named by you in your application to file petition for naturalization?

A. I have known Florence Gardner since about 1925.

Q. In what way are you acquainted with Florence Gardner?

A. Florence Gardner came to eat in my restaurant about 1925, or maybe it was 1926, and asked me for a job in the restaurant. About three months after I first met Florence Gardner I employed her as waitress and cook in my restaurant. I had a room at her house, which I took about six months after she commenced working for me.

Q. Information has come to me that you are now living with a woman who is not your wife. Is true or not?

A. I have not lived with a woman as my wife since 1932, when I purchased the property at which I now live. The number of which is 213 Magnolia Street, Hot Springs, Arkansas. Before 1932, I  
63 had sexual relations with Florence Gardner for about five years. Florence Gardner is about ten years older than I, and she would come to my room where we had intercourse, sometimes once a week and sometimes once in two weeks and sometimes oftener.

Q. Did you pay Florence Gardner any money for having intercourse with you?

A. Yes; I treated her just like I would my wife, sometimes giving her \$10.00, sometimes \$5.00, sometimes \$1.00, or by purchasing for her shoes, clothing, or anything else she might like. I also paid her

about \$7.00 a week for her services in my restaurant as cook and waitress.

Q. Did you ever introduce Florence Gardner to any of your friends or acquaintances as your wife?

A. No; I did not. Sometimes people would ask me if Florence Gardner was my mother, as she is considerable older than I am.

Q. How long has it been since you have had sexual intercourse with Florence Gardner?

A. About eight or ten months. I told her not to come to my house any more.

Q. Have you had any other woman with whom you have maintained immoral relations?

A. Yes; whenever I see a woman on the street and want a woman, I get one.

Q. How many women would you say you have had immoral relations with in Hot Springs?

A. I don't know, but it has been a great many. I usually pay them whatever they ask if I have the money.

Q. For how long a time have you followed this immoral method of living?

A. Ever since I came to the United States. I went to Pittsburgh from Monassen when I lived in Monassen and Bentleyville every Saturday night, and went to houses of prostitution on Second Street, among others, in Pittsburgh.

Q. Are you afflicted with syphilis or any other venereal disease?

64 A. No; I do not think so. I have been informed that I have sciatic rheumatism.

Q. I have been informed that some girl recently got into serious trouble at Newport, Ark., and that you had some connection with this trouble. Will you tell me about this matter?

A. A street walker by the name of Florence, whose last name I do not know, got into some kind of trouble at Newport or Batesville, Ark. She wrote me asking me for money as she was sick and had only eight cents in her pocket book. I could not send her any money because I knew her only as Florence. I have had intercourse with her about twice here in Hot Springs.

Q. Mr. Strecker, did you ever send your wife money in Austria for her support and the support of your son?

A. Yes; I estimate that I have sent my wife about \$1500.00 (Fifteen Hundred dollars) since my arrival in the United States almost twenty-one years ago. I sent her on one occasion \$500.00 which I believe was in the year 1928. I have sent her various amounts at other times, ranging from \$10.00 to \$50.00, sometimes \$100.00.

Q. Have you any papers to show which will prove that you have ever sent your wife any money at all?

A. I do not know if I can produce any records, unless possibly the Postoffice or the Arkansas Trust Company, of Hot Springs, would have such a record. I sometimes sent a money order by the name of

Snitzer, who had a bank in New York City, and Snitzer would send the money to my wife, as he could do it cheaper than to send it from Hot Springs direct.

Q. Have you ever been arrested or charged with violation of any law of the United States or of any state or municipality?

A. Yes; I have been arrested as follows: I was arrested on a charge of selling liquor at my restaurant in the year 1926 or 1927, but I was not convicted as I had no whiskey in my restaurant. I was also arrested for having immoral relations with Florence Gardner, the woman mentioned earlier in this statement, and was fined \$10.00 (Ten Dollars) by Judge Ledgerwood, of the Hot Springs Municipal Court. I was also charged with selling cigarettes without stamps but was not fined on this occasion.

Q. Are you certain that you have never been arrested on any other occasion?

A. I have never been arrested on any other occasion than the three times above mentioned.

Q. I notice in the statement numbered 29 on your application to file petition for naturalization you deny ever having been arrested or charged with the violation of any law of the United States or State or City Ordinance or traffic regulation. Why did you make this misstatement in your application?

A. I had the lady at Little Rock in the office where I paid the \$10.00 (Ten Dollars) fill out this application for me. I did not want to tell her that I had been arrested and I thought that if I said I had never been arrested, I would get my papers without too much red tape.

Q. It has been reported to the Government that you are connected with the Communists at Hot Springs. Please state if you are at this time or have ever been a member of the communist party, or of any other organization which has for its purpose the embarrassment or the destruction of the Government of the United States?

A. Yes, I joined the Communist Party last November, at a time when a meeting was had at the Negro Church located at 410 East Grand Avenue, in Hot Springs, Arkansas, on November 1, 1932. I paid forty cents to some man from Little Rock, and was given a book about January 1933, which book contains stamps showing the amount paid by me. There were present at the above mentioned meeting about fifty people, some of whom were negroes and other whites.

Q. Is it true as reported to the Government that you have been distributing Communist literature?

A. A tailor from Little Rock handed some of this literature and I handed it to somebody else, but I do not know the name of the person or persons to whom I handed it.

66 Q. Is it not true that at one time you had a considerable quantity of Communistic literature in your home?

A. I have received letters from New York urging me to buy Gold Bonds of the Communist Government in Russia.

Q. Have you ever bought any of these bonds?

A. Yes, I have bought 2,200 rubles worth of bonds of the Soviet Union, Socialist Republic, for which I paid in American money the sum of Fifteen Hundred and Eight' Eight (\$1,588.00) dollars.

Q. When did you make this purchase?

A. About two months ago.

Q. What was your purpose in purchasing the above bonds?

A. It was represented to me that the United States Government's money would soon be worthless, or at best very cheap, and I thought it wise for my own protection to put my money into bonds of the present Russian Soviet Government. These bonds are paying interest in gold dollars American money.

Q. Is it not a fact that you went to a man at a filling station and asked him to distribute Communistic literature?

A. I do not remember. I may have handed somebody literature of this kind, but I am unable to recall just who it was.

Q. You stated that you had paid forty cents for which you received a book of stamps in it showing that you are a member of the Communist Party. Please state if you have ever paid any other money to the Communist Party?

A. No, I have never paid any more money to the Communist Party.

Q. Do you take any newspapers of any kind, which have any connection with Communism?

A. A Russian by the name of John Greenock (?) stayed at my house sometime last year and left owing me \$10.00 room rent. He wrote me and told me that he could not pay this room rent, but that he would send me the Communist Paper known as the Daily Worker, 67 printed at New York, and this paper has been coming to my home about nine months. It comes sometimes every day and sometimes every other day.

Q. And I suppose that you read this paper?

A. Yes; I read this paper.

Q. Have you ever written to this paper asking that it be discontinued?

A. No; I have not.

Q. Do you now deny on your oath that you are a Communist at heart?

A. I do not consider myself a Communist, because I am not paying dues to the Communist Party. I do not know whether we shall ever have a Communistic system in the United States. I have read Marx's books and Marx states that sooner or later there will be a Red Government in every country in the world. I am trying to protect myself, and that is why I bought the bonds of the Russian Government. I do not know what is going to happen; I do not know how long I am going to live. If I knew when I was going to die, I would get me about four women and have a hell of a time before I die. If Communism comes in this country I will not be



against it, because I have got to go with the people, and whatever the people want I will have to go along with them.

And further the said Joe Strecker said not.

(Signed) JOE STRECKER.

Subscribed and sworn to before me this 16th day of September 1933.

(Signed) WALTER L. WOLF,  
Acting District Director of Naturalization  
for the 12th Naturalization District.

Signed in the presence of Curtis Ridgway.

68 *Exhibit 6, being record of hearing before L. B. Stenaland, immigration inspector, on May 23rd, 1934, at Hot Springs, Arkansas.*

United States Department of Labor Immigration and Naturalization Service, New Orleans, Louisiana. New Orleans File No. 34000/62. Record of Hearing.

Present for the Government: L. B. Stenaland, Imm. Inspector.

Present for the alien: Felix L. Smith, Attorney for alien.

Case re-opened at Hot Springs, Arkansas, by authority of Bureau letter of May 8th, 1934, No. 55848/822.

Emergency Stenographer: Miss Blanche Nichols.

Hearing held at office of Attorney Felix L. Smith, Hot Springs, Arkansas, May 23rd, 1934.

By Inspector L. B. STANALAND:

Alien, being first duly sworn, testifies, in English, as follows:

Q. What is your name?

A. Joe Strecker.

Q. Were you ever known by any other name?

A. Never.

Q. Isn't it true that you are known as Joseph George St'ecker?

A. They call me Joseph at home.

Q. Haven't you used the name of Joseph G. Strecker?

A. No.

69 Q. Are you the same Joseph George Strecker who made a sworn statement in the office of the Chief of Police of Hot Springs, Arkansas, before Immigration Inspector Carroll D. Paul on Oct. 25th, 1933?

A. Yes. I did make a statement but I don't remember the name of the Inspector.

Q. Are you the same Joseph Strecker who made a sworn statement before the acting district inspector in the presence of Curtis Ridgway in September 1933?

A. Yes, sir.

Q. Are you the same Joseph Strecker or Joseph G. Strecker who made a sworn statement before Inspector Isaac H. Vincent in Hot Springs, Arkansas, January 23rd, 1934?

A. Yes, sir.

Q. You are advised that the Bureau of Immigration and Naturalization of Washington has ordered that the case be re-opened for the purpose of introducing into the records of International or other authorities sufficient exhibits of Literature of the Communist Party to show that the Party advocates to overthrow by force or violence the United States Government or other forms of organized government. You are advised that the Government will introduce a copy of The Communist dated April 1934, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America:

Exhibit "A." (Page 337—1st, 2nd, and 3rd paragraphs.)

"The Austrian revolt bore out the correctness of the prediction made by Comrade Stalin, in his report to the Seventeenth Congress of the Communist Party of the Soviet Union. On the 26th day of January, seventeen days before the Austrian revolt, Comrade Stalin had declared:

70 "But if the bourgeoisie chooses the path of war, then the working class in the capitalist countries who have been reduced to despair by four years of crisis and unemployment takes the path of revolution. That means that a revolutionary crisis is maturing and will continue to mature. And the more the bourgeoisie becomes entangled in its war combinations, the more frequently it resorts to terroristic methods in the struggle against the working class and the toiling peasantry, the sooner will the revolutionary crisis mature."

"The Austrian workers took the path of revolution—and their guns dealt death to Austro-Marxism."

Exhibit "B." (Page 341—1st, 2nd, and 3rd paragraphs.)

"How aptly the theory of Austro-Marxism matches its practice! Recently the leader of Austrian social-democracy, Otto Bauer, declared:

"In Austria, more than in almost any other country, there is the prospect that State power will be won by the working class along the road of democracy. If but the proletariat here will understand merely how to make use of their legal opportunities, then very soon the bourgeoisie will begin to shout, as Odilion Barrot did in 1849: 'La legalite nous tue!' (Legality is killing us!)

"If at the same time our soldiers, our gendarmes, our schutzbund is defending republican legislation, then the bourgeoisie will be unable to smash this legislation, since the legal measures of the election address place the legal powers in our hands."

"Very true, Herr Bauer, legality has killed us! But it is not Odilion Barrott, nor Englebert Dollfuss—but the workers of Austria who cry out these words!

71 "They whom you subjected for decades to the use of their 'legal opportunities'; whom you allowed to be systematically disarmed, lest they use their extra-legal opportunities; whom, by your own confession, you held back in March of last year from responding

to the call of the Communist Party for the general strike that would have broken the fascist offensive; whom you betrayed by your advocacy of the use of 'legal opportunities' of accepting fascist decree after decree. They whom you urged to retreat before the government's attacks upon their living conditions, whom you instructed to offer no resistance to the destruction of their political rights;—they whom you taught to defend bourgeois republican legislation, the Schutzbund, whose dissolution you permitted without a summons to resistance as a stoic exercise in the use of the legal 'opportunities' of obedience to fascism; they whom you tried to chain to the United front with fascism in the black shirt under the pretense of fighting fascism in the brown shirt—it is they who cry 'Legality has killed us!' The workers of Austria cry out these words.

Exhibit "C." (Page 392—First and Last Paragraph)

"The call for help of the Central Executive Committee of the Chinese Soviet Republic must not remain without a wide echo, which should be translated into acts.

"Every party that desires to belong to the Communist International must give every possible support to the Soviet republics in their struggle against all counter-revolutionary forces. The Communist parties should carry on a precise and definite propaganda to induce the workers to refuse to transport munitions of war intended for enemies of the Soviet Republics, carry on legal, or illegal propaganda among the troops which are sent to crush the workers' republics, etc."

72 "To fulfill this duty, the Communist Parties must carry to the broadest masses the words of the call of the Central Executive Committee of the Chinese Soviet Republic, which are directed to the toilers of the entire world. They must conduct not only agitation, but they must also organize actions directed against the transportation of weapons and munitions to China, against the intervention of American, European, and Asiatic imperialists."

Exhibit "D." (Page 393—By Wan Ming—Second Paragraph)

"The first and most important difference is that the plan of the campaign, the intervention of the international imperialists (America, Japan, England, France, Germany and others) against the Chinese Soviet Republic, has been worked out with greater frankness, more nakedly, with greater energy and solidarity. All the other differences result from this most important one."

Exhibit "E." (Page 404—Last Paragraph)

"It is more than likely that in the course of the development of the world revolution, there will come into existence—side by side with the

foci of imperialism in the various capitalist lands and with the system of these lands throughout the world—foci of socialism in various Soviet countries, and a system of foci throughout the world. As the outcome of this development, there will ensue a struggle between the rival systems, and its history will be the history of the world revolution. The world-wide significance of the October revolution lies not only in the fact that it was the first step taken by any country whatsoever to shatter imperialism, that it brought into being the first little island of socialism in the ocean of imperialism, but likewise in the fact that the October revolution is the first stage in the world revolution and has set up a powerful base whence the world revolution can continue to develop." (Stalin, "The October Revolution and the Tactics of the Bolsheviks." Leninism, International Publishers, Vol. I, pp. 215, 216.)

Exhibit "F." (Page 406—2nd paragraph.)

"Such a formulation of this question is certainly not Marxian. To confine the work of the Party to the propagation of the final overthrow of capitalism, without mobilizing the workers for struggle against capitalism, is nothing less than the betrayal of the working class to the bourgeoisie. The task of the revolutionary party of the working class is to defend the everyday interests of the working class, but to do so in such a way that the workers will understand from their own experience, that only with the overthrow of capitalism and the establishment of the rule of the working class will their interests be finally secured. "The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor everyday needs as a starting point from which to lead the working class to the revolutionary struggle for power." (C. I. Program.)

Exhibit "G." (Page 409—2nd, 1st, 3rd, and 4th paragraph.)

"In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the mass political strike and for an armed insurrection of the fight for power, means to disarm the workers in the fact of the attack of the bourgeoisie.

"DeLeon's conception of the proletarian revolution was the same, as far as the deception for the American proletariat goes, as that of the reformists of the Second International, in spite of his revolutionary phrases. Lenin, in his State and Revolution, makes a classical formulation about Kautsky's position on this point, which can fittingly apply to DeLeon, Lenin states:

"The necessity of systematically fostering among the masses this and just this point of view about violent revolution lies at the root of the whole Marx' and Engels' teachings. The neglect of such propaganda and agitation by both the present predominant social-chauvinists and Kautskyst currents being their betrayal \* \* \* into prominent relief." (P. 20, International Ed.)



"The question of a violent revolution lies at the root of Marx's teachings. Only philistines or downright opportunists can talk about revolution without violence."

Q. You are advised that a true transcription of the quotations just read to you will be included in the records of this hearing and that the pamphlet from which these examples were taken will be made a part of the record for the Secretary of Labor of Washington, D. C., for her consideration in the disposition of this case. Have you any documents to present or evidence to offer at this time in rebuttal of this evidence that your membership in the Communist Party constitutes membership in an organization which believes in or teaches the overthrow by force or violence the government of the United States or all forms of organized government?

A. Yes; I have evidence I wish to introduce to rebut the exhibits as presented.

G. MERRITT, witness, called, sworn, testified:

By FELIX L. SMITH:

Q. State your name.

A. G. L. Merritt.

Q. Where do you live, Mr. Merritt?

75 A. 2226 Central Ave., Hot Springs, Arkansas.

Q. What is your trade?

A. Wholesale tobacco and candies.

Q. How long have you lived in Hot Springs?

A. About 32 years.

Q. Are you acquainted with Joe Strecker?

A. I am.

Q. How long have you known Mr. Strecker?

A. I have been knowing him for 10 or 11 years.

Q. During that time what has been your opportunity of knowing the defendant?

A. He was in business about two years on Grand Avenue and I called on Joe two or three times a week during the two years he was in business in the interest of selling him cigars, cigarettes, and candy.

Q. What has been your opportunity of knowing Mr. Strecker since that time?

A. Since that time I have seen very little of Joe.

Q. Upon your acquaintance with Mr. Strecker I will ask you to state your opinion as to him being a law abiding resident of Hot Springs.

A. Every opinion I have had of Joe has been that he is upright and honest in every dealing I have had with him.

Q. During the time that you knew Mr. Strecker in business relations I will ask you to state what you may know of your own knowledge as to the moral life of Strecker?

A. His morals, as far as I know, are all right.

Q. Did you ever call on Joe and find him drunk or drinking?

A. Have never found him drinking or drunk.

Q. What has been your information about the reputation of Joe in Hot Springs?

A. I have made no inquiries and have heard no one say what his reputation is.

Q. Is it your opinion that Joe Strecker is a good resident?

A. I would say so, yes.

76 Q. Do you visit Mr. Strecker in his home?

A. I believe I called at Mr. Strecker's home once or twice, in a business way to collect a little bill he owed me.

Q. Does Mr. Strecker visit you in your home?

A. No.

Q. Do you know that Mr. Strecker has ever bought whiskey?

A. No, not that I know of.

Q. Have you ever known Mr. Strecker to advocate Communism or any form of violence in Government conditions?

A. No, sir.

EMMETT DOOLEY, witness called, sworn, testified:

By FELIX L. SMITH:

Q. State your name.

A. Emmett Dooley.

Q. Where do you live, Mr. Dooley?

A. 202 Jackson Avenue, Hot Springs, Arkansas.

Q. How long have you lived in Hot Springs?

A. About 20 years.

Q. What is your occupation?

A. Musician.

Q. Do you know Joe Strecker?

A. Yes, sir.

Q. How long have you known him?

A. 10 or 12 years.

Q. During that time what has been your opportunity of knowing Mr. Strecker?

A. To eat in his place most every day and to visit around with him when I didn't have anything to do and we usta be "cronies" on the street.

Q. How often have you seen Joe Strecker in the past 10 years?

A. Two or three times a week. Sometimes every day when he was in the restaurant.

77 Q. Do you commonly meet and converse with Strecker?

A. Yes, sir.

Q. Has Strecker ever advocated Communism to you?

A. No, sir.

Q. Has he ever advocated any violent means of force to overthrow our Government?

A. No, sir.

Q. Do you consider Strecker a desirable resident?

A. Yes, sir; very much so.

Q. I'll ask you to state your opinion of the moral character of Joe Strecker?

A. I think it is first class. We used to drink a little beer together a long time ago is the only thing I know of.

By Inspector L. B. STANALAND:

Q. Where were you born?

A. Brandenburg, Ky.

Q. Do you visit Mr. Strecker in his home?

A. I have visited him once or twice in his home.

Q. Does Mr. Strecker visit in your home?

A. Yes; he has been there three or four times.

Q. Do you ever know of Mr. Strecker being arrested?

A. One time.

Q. What was the charge?

A. A negro came into his place of business drunk and started a little row. Two officers came in and arrested him, but he was released the next morning.

Q. What was the charge?

A. They just came in and grabbed him—I don't know the charge.

Q. Did you know Joe Strecker in 1932?

A. Yes, sir.

Q. Did he ever talk politics with you at all?

A. No, sir.

That's all.

78 PATRICK EARLY, witness called, sworn, testified:

By FELIX L. SMITH:

Q. State your name.

A. Patrick Early.

Q. Where do you live, Mr. Early?

A. 315 Quapaw Avenue, Hot Springs, Arkansas.

Q. How long have you lived in Hot Springs?

A. 34 years.

Q. Where were you born?

A. Worcester, Mass.

Q. Are you acquainted with Joe Strecker?

A. Yes, sir.

Q. How long have you known him?

A. About 7 years.

Q. During that time what has been your opportunity of knowing him?

A. I was employed at the Ozark Sanatorium Bath House where he used to come in and get hot water.

Q. How often have you seen Joe Strecker in the past 7 years?

A. I have seen him sometime every day for six months at his place or where I live.

Q. Would you say that you are intimately acquainted with him?

A. Yes.

Q. Upon your acquaintance with Joe Strecker I will ask you to state what is your opinion of this man as a resident?

A. He seems to me to be alright and upright as far as I can see.

Q. Have you ever discussed any political matter with him?

A. No.

Q. Have you ever heard Strecker discuss Government matters?

A. No; I never did.

Q. Do you know anything about the moral character of Joe Strecker?

A. No.

79 Q. Have you ever heard him advocate Communism?

A. No, that is something I wouldn't stand for.

Q. Have you ever heard that Joe Strecker is a Communist?

A. No.

Q. Have you had any business relationships with him?

A. No.

Q. Did you eat at his place when he was in the restaurant business?

A. No.

Q. Do you work now?

A. No, when I got a pension from the Spanish War I quit working.

S. W. WRIGHT, witness called, sworn, testified:

By FELIX L. SMITH:

Q. State your name.

A. S. W. Wright.

Q. Where do you live, Mr. Wright?

A. 101 Lindy Street, Hot Springs, Arkansas.

Q. How long have you lived in Hot Springs?

A. Since 1913.

Q. Where were you born?

A. Kentucky.

Q. What is your occupation, Mr. Wright?

A. I am a painter by trade, but haven't been working at that lately. I have been handling a little real estate.

Q. Are you a property owner?

A. Yes, sir.

Q. Are you acquainted with Joe Strecker?

A. Yes, sir.

Q. How long have you known him?

A. 11 or 12 years, ever since I came here, I guess.

Q. What has been your opportunity of knowing Joe at this time?

A. By passing and re-passing and I have been out to his place sometime two or three times a week.



80. Q. Would you say that you are intimately acquainted with Joe Strecker?

A. Well, yes.

Q. Upon your acquaintance what is your opinion of Joe Strecker as a resident?

A. As far as I know he has been loyal and upright and is as good as the average citizen of Hot Springs.

Q. Have you at any time heard Joe Strecker advocate Communism?

A. No, sir, I never did.

Q. What is your opinion of his moral character?

A. As far as I have seen it is as good as the average.

Q. Have you had business dealings with Mr. Strecker?

A. No business whatever. I have just been in his place for eats and drinks and I lived about 300 yards from his place.

Q. Have you ever visited in Mr. Strecker's home?

A. No, sir.

Q. Did you ever see him do any bad things around in town?

A. No, sir.

Q. Did you ever hear him say he had enemies or know of him fighting with them?

A. No, not that I know of.

Q. Did he ever bootleg?

A. No, not that I know of.

Q. Is Joe Strecker commonly known as a man that gives the town trouble?

A. Absolutely not.

Q. Do you know of anything in conversing heretofore that would keep Joe Strecker from being a good citizen to this country?

A. No.

By Inspector STANALAND:

Q. Do you owe Joe Strecker anything?

A. No, not a dime.

Q. Are you under any obligation to him?

A. None whatever.

81 Q. How long do say that you have known Strecker?

A. 10 or 12 years.

Q. Are you married?

A. Yes.

Q. Have you ever visited in his home?

A. No.

Q. Have you ever talked politics with him?

A. No, sir.

Q. Did you discuss the recent Presidential election with him?

A. No.

Q. Do you know whether he is a follower of the Communist Party or not, who believes in a force of violence to overthrow our Government?

A. He is always for our Government.

Q. Do you know whether he was ever arrested or not?

A. Just hearsay—I don't know for sure.

Q. Did Mr. Strecker ever keep a woman?

A. If he did I didn't know it.

That's all.

JOE STRECKER.

By FELIX L. SMITH:

Alien, being first duly sworn, testifies, in English, as follows:

Q. State your name.

A. Joe Strecker.

Q. Where do you live?

A. 213 Magnolia Street, Hot Spring, Arkansas.

Q. Do you own the property where you live?

A. Yes, sir.

Q. Do you own any other property in the state of Arkansas?

A. Yes, I own a small farm.

82 Q. Where is this farm?

A. In Montgomery County.

Q. Do you own any other property in Arkansas?

A. No, sir.

Q. How long have you been a property owner in Arkansas?

A. Since 1927, I think.

Q. Do you hold considerable mortgage against property of other people at this time?

A. Yes, sir.

Q. Are any of these mortgages now due?

A. They are all due now.

Q. Have you ever at any time entered a foreclosure suit in the State of Arkansas against any of these people?

A. No, sir.

Q. Do you enjoy your residence in the United States?

A. Yes, very much.

Q. Is it your wish to remain in the United States?

A. Yes, sir.

Q. Do you wish to become a citizen of the United States?

A. Yes, sir.

Q. Have you ever at any time knowingly advocated the overthrow of the United States Government by violence or by revolution?

A. No, sir.

Q. Do you at this time advocate the overthrow of the United States Government?

A. No, sir.

Q. Do you believe that the Government of any other Country is superior to that of the United States?

A. No.

Q. On October 25th, 1933, you were examined at the office of the Chief of Police of Hot Springs, Arkansas, before Immigrant Inspector Carroll D. Paul, were you not?

A. I don't know his name, but I was examined at that time.

83 Q. At that time were you sworn?

A. I don't think so; I don't remember.

Q. At that time did you sign your name to your answers?

A. Yes; I signed them.

Q. Mr. Strecker, I hold in my hand what purports to be an examining given to you at that time and among the questions and answers found in this record you were asked the following question, "Will you tell me what the aim and purpose of the Communist Party of America is?" The record shows your answer to be, "Yes, the purpose is to overthrow Capitalism and establish a Government by the people." Following this question you were further asked, "Do you mean a Government similar to that now in existence in Russia." The record shows your answer was, "Exactly." Now, Mr. Strecker, I want to ask you if the record as read to you was correct?

A. No.

Q. I'll ask you to state, as you recall, what you said on that occasion?

A. I told him we don't want a Government like that of Russia. I am a Capitalist myself.

Q. Have you ever advocated the overthrow of organized government in this country or any other country by violent means?

A. No.

Q. Do you now advocate the overthrow of this government by violent means?

A. No.

Q. Were you examined in the office of the Prosecuting Attorney in the Citizens' Building in Hot Springs, Arkansas, on or about September 26, 1933, by Walter L. Wolf, at which time you were an applicant for citizenship in the United States?

A. Yes, sir.

Q. At that time, Mr. Strecker, were you sworn?

A. Yes, sir.

Q. At that time did you sign your name to the examination after it was concluded?

84 A. Yes, sir.

Q. I hold in my hand what purports to be this examination in which I find you are asked the following question, "Do you now deny on your oath that you are a Communist at heart?" to which your answer was, "I do not consider myself a Communist, because I am not paying any dues to the Communist Party. I do not know whether we shall ever have a Communist system of Government in the United States. I have read Marx's books and Marx states that sooner or later there will be a 'Red' Government in every country in the world. I am trying to protect myself and that is

why I bought the bonds of the Russian Government. I don't know what is going to happen; I don't know how long I am going to live; if I knew when I was going to die, I would get me about four good looking women and have a Hell of a time before I die. If Communism comes in this country I will not be against it, because I have got to go with the people and whatever the people want I will have to go along with them."

Now I will ask you to state, Mr. Strecker, if these records, as just read to you, were correctly transcribed?

A. He didn't write it the way I told him—he wrote it the way he wanted to and didn't read it to me.

Q. I'll ask you to state if on that occasion you did deny that you were a Communist.

A. I told him I was not a Communist.

Q. Mr. Strecker, I want to ask you to state or explain your future statements made at that time about the relations with women in which you said if you were going to die you would get about four women around before you die.

A. I expressed it in that way so he would stop questioning me and I was only joking.

Q. Were you serious at the time you answered the question?

A. I was merely joking and didn't mean it.

Q. Is that your idea of happiness on earth?

A. No.

95 Q. Do you admit making that statement on that occasion?

A. Yes.

Q. Did you mean the statement at the time you made it?

A. No.

Q. I'll ask you to state that if ever on any previous examination at any time did you admit that you were a Communist?

A. No, sir.

Q. Have you ever considered yourself as a Communist?

A. No.

Q. Do you now consider yourself one?

A. No.

Q. Mr. Strecker, you have been confronted on this question by the introduction of the certain exhibits from the Eighth Convention Issue of the April 1934 issue of the "Communist" and have had these excerpts read to you as exhibits in this case from this publication. Now, I'll ask you to state if you understand these quotations as they are read to you?

A. I don't know anything about this. I understand some and some I do not. I don't make my living trying to understand that.

Q. Mr. Strecker, I will ask you to state if you have ever seen a copy of "The Communist" prior to this date?

A. No.

Q. I'll ask you to state if you have ever been a subscriber to this publication?



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A. No.

Q. Have you ever received a publication prior to this time?

A. No.

Q. Did you know before today that there was such a publication in existence?

A. I never knew it.

86 Q. Are you at present a member of the Communist Party?

A. No.

Q. Do you subscribe to their doctrines or teachings?

A. No.

Q. Do you believe in their theory that was read to you today from "The Communist"?

A. No.

Q. I'll ask you to state what your opinion is, Mr. Strecker, as to whether the working class should organize in all lands against present constituted governments?

A. We should not organize against the government is my belief.

Q. Do you believe that Capitalist work against working class of people?

A. No; I don't think so.

Q. Mr. Strecker, do you advocate that the working class of people using guns or other destructive means to overthrow our government or any other government?

A. No.

Q. Mr. Strecker, do you know what the theory of Austro-Marxism is?

A. No.

Q. Do you believe or advocate that Government is killing us?

A. No.

Q. Do you believe in the overthrow of Government?

A. No.

Q. Mr. Strecker, are you at present taking any part to aid the works of any party outside of the United States? Are you a subscriber to any publication that audits that? Are you paying any dues to help any organization in any work like that?

A. No.

Q. Are you in sympathy with efforts to stop transportation of weapons to China?

A. I am not interested in anything like that.

Q. Are you satisfied with the working conditions in America?

87

A. Yes, sir.

Q. Do you consider yourself a working man or a Capitalist?

A. As I understand it when you have a few dollars you are considered a Capitalist and as I have a few dollars and am also a working man I would think I am both.

Q. Do you agree with any plans that you read from this book?

A. No.

Q. What are your ideas about the proper means to employ to make changes in the Government?

A. By voting and elections of good officials. I believe in evolution and not revolution.

By Inspector L. B. STANALAND:

Q. Mr. Strecker, were you ever arrested?

A. Yes.

Q. When? How many times?

A. I was arrested about three times.

Q. When and why was the first arrest made?

A. About 1927 or 1929 they came and arrested me for selling cigarettes.

Q. Was that the first time?

A. Yes.

Q. When and why was the second time?

A. I was arrested for possession of whiskey, but they didn't find any.

Q. Were you fined on the cigarette charge?

A. No.

Q. Were you convicted for the violation of the prohibition law?

A. No.

Q. Were you ever fined at any time?

A. Yes.

Q. When was that?

A. 1926 or 1927.

Q. Joe, do you deny that you made a statement before Inspector Carroll D. Paul on or about October 25th, 1933, that "you gave out literature that was sent to you from the headquarters in Kansas City to some other people to circulate"?

A. I have never distributed any literature at any time.

Q. What was your purpose of joining the Communist Party?

A. I wanted to find out what they were.

Q. How long was it before you found out what it was about?

A. Maybe a month or two, when I read the Worker.

Q. What do you mean about what you read?

A. When I read the "Daily Worker."

Q. Didn't they explain what the Communist Party meant at that meeting?

A. They just talked about big landlords and that we had to do something about it, but didn't say anything about the overthrow of any Government.

H. C. STEPHEN, witness called, sworn, and testified:

By FELIX L. SMITH:

Q. State your name.

A. H. C. Stephen.

Q. Where do you live?

A. 453 South Border St., Hot Springs, Arkansas.

Q. What is your occupation?

A. Salesman.

Q. Are you at present and past a Spanish War Veteran?

A. For 6 years.

Q. How long have you lived in Hot Springs?

A. I have been here for 7 years.

Q. Mr. Stephen, are you acquainted with Joe Strecker?

A. I am.

Q. How long have you known him?

A. About 4 years.

Q. During that time what has been your opportunity of knowing Joe Strecker?

89 A. I have been with him several times and have seen him with Benedict.

Q. During that time how often have you seen him?

A. I have seen Joe on an average of five or six times a month.

Q. Are you intimately acquainted with Joe Strecker?

A. Yes.

Q. I'll ask you to state, Mr. Stephen, your opinion of Joe Strecker as a resident of Hot Springs, Arkansas.

A. I have found him to be a good resident.

Q. Have you ever at any time discussed political matters with him?

A. Well, yes.

Q. Has this man on any occasion indicated to you that he holds to any belief in Communism?

A. No; but he has said something about having read the works of Karl Marx, but as I remember it he didn't hold with the teachings and that he has disposed of the books at this time and sometime prior to this.

Q. Upon your intimate acquaintance with Joe Strecker, I'll ask you to state what your opinion is of his moral character.

A. From what I know I would take it that he is about as good as the average.

Q. Upon this acquaintance with Mr. Strecker and upon what you have heard about the man, would you consider Joe Strecker in any sense an undesirable resident of Hot Springs?

A. No; I do not.

Inspector L. B. STANLAND:

Q. Are you married?

A. No, sir.

Q. Have you ever visited Mr. Strecker in his home?

A. Yes; on some occasions.

Q. Has he ever visited you in your home?

A. He has visited in my office several times while I was making it my home.

90 Q. You state that you have seen Mr. Strecker on an average of about 6 times a month. What was the occasion of these meetings with him?

A. Just a casual meeting on the street.

Q. Have you ever done any business with him?



A: Yes; I borrowed some money.

Q. How much?

A. About \$60.00 once.

Q. How long has that been?

A. Sometime in December of last year.

Q. Have you repaid this money?

A. Yes.

Q. When?

A. Last January.

Q. Did Mr. Strecker charge you any interest on this money?

A. No.

Q. Did you borrow it on any security?

A. No; just on my hand. By the way, you asked me if I paid any interest on the money I borrowed; yes, I paid a small interest.

Q. On what occasion did Joe tell you of Karl Marx?

A. When just discussing literature.

Q. Did you ever discuss politics with him at all?

A. Yes.

Q. Did he give you any outline at all of what he thought constituted a good Government?

A. No; the only talk we would have would be more on the general trend of the country, in regard to Socialism against Communism.

Q. Was he opposed to Communism?

A. Yes.

Q. Did he tell you he had been a member of the Communist Party?

A. He told me that he was once a member, but not now.

Q. Did he tell you why he was opposed to the Communist Party?

91 A. No.

Q. Did you ever hear him criticize the Communist Party?

A. No.

By FELIX L. SMITH:

Q. Where were you born?

A. In Texas.

That's all.

CLARK QUERTERMONS, witness called, sworn, and testified:

By FELIX L. SMITH:

Q. State your name.

A. Clark Quartermons.

Q. Where do you live?

A. 213 Magnolia St., Hot Springs, Arkansas.

Q. Are you a married man?

A. Yes, sir.

Q. How many in the family?

A. Wife and two children.

Q. For whom do you work?

A. Citizen's Cigar Store.

Q. How long have you lived in Hot Springs?

A. I came here in January 1928.

Q. Where were you born?

A. East St. Louis, Ill.

Q. Are you acquainted with Joe Strecker?

A. Yes.

Q. How long have you known Mr. Strecker?

A. I met Joe in the spring or summer of 1929.

Q. Have you known him since that time?

A. Off and on. I lived on East Grand and dropped in his place for breakfast.

Q. During the past six years I'll ask you to state how often you have seen Joe Strecker.

92 A. Up until last summer I just saw Joe a few times a month.

Q. Since the summer of 1933 how often have you seen Joe Strecker?

A. We moved into town in the summer and lived at Joe's place.

Q. I believe you are now staying at the same address as Mr. Strecker.

A. Yes, sir.

Q. How long have you stayed in the home where Mr. Strecker lives?

A. On this last occasion since the first of February 1934.

Q. I'll ask you to state if you are intimately acquainted with Mr. Strecker.

A. Yes; I would say I am very much intimately acquainted.

Q. Upon your acquaintance with him I'll ask you to give your opinion as to whether or not Mr. Strecker is a desirable resident of Hot Springs.

A. I should say that Joe is a very desirable resident of Hot Springs.

Q. How often do you see Mr. Strecker now?

A. I see him in the mornings before I go to work and in the evenings he comes in and listens to the radio. At least every day.

Q. What is your opinion as to the moral character of Mr. Strecker in his daily life?

A. Well, for a man of Joe's age and a bachelor, I would say he is an average. I have never seen him with anyone.

Q. How does Joe conduct himself about the house?

A. He is very neat and industrious and has a little garden by the side of the house where there is hardly a place for one.

Q. Is Mr. Strecker a drinking man?

A. Mr. Strecker has refused to drink with me several times.

Q. Have you ever discussed politics with him at any time?

A. No, sir.

93 Q. Have you ever heard the man advocate Communism?

A. No, sir.

Q. Have you ever heard him advocate the overthrow of this Government or any other government?

A. No, sir.

Inspector L. B. STANALAND:

Q. How long did you say you have known Mr. Strecker intimately?

A. Intimately, I have known him about one and a half years.

Q. You didn't know him during the recent Presidential election?

A. No.

Q. You have never discussed the election with him?

A. No, sir.

Q. You state that he is a desirable resident, why?

A. Because he is good hearted, takes my kid out and buys it ice cream and etc.

Q. You are renting from Mr. Strecker?

A. Yes, sir.

Q. Do you owe him any money?

A. No.

Q. Do you owe him anything?

A. No.

Q. You state that Mr. Strecker refused to take a drink with you—do you know that the possession of liquor is a violation of the law?

A. Yes, sir.

DEWELL JACKSON, witness called, sworn, and testified:

By FELIX L. SMITH:

Q. State your name.

A. Dewell Jackson.

Q. Where do you live?

94 A. 108 Edgwood, Hot Springs, Arkansas.

Q. What is your occupation?

A. Cashier of the Arkansas Trust Co.

Q. How long have you been employed there?

A. I have only been cashier for 4 months, but have been in the bank 17 years.

Q. Mr. Jackson, are you a member of the Hot Springs School Board?

A. Yes, sir.

Q. Are you a married man?

A. Yes.

Q. How many in the family?

A. Wife and one child.

Q. Where were you born?

A. Near Benton, Arkansas, Saline County.

Q. Mr. Jackson, I'll ask you if you are acquainted with Joe Strecker.

A. I am.

Q. How long have you known Mr. Strecker?

A. I have known Joe I expect 12 years at least, and maybe longer.

Q. During this time I'll ask you to state what your acquaintance has been with Mr. Strecker.

A. Well, my acquaintance has been with him only in the bank in a business way. I haven't been intimately associated with him, but he has dealt with the bank for 10 years. I was a teller *was a teller* at the bank at that time and waited on him during this time.

Q. During this time I'll ask you to state about how often you have seen Mr. Strecker?

A. I would say that he came into the bank twice a week on an average when he had the little place of business.

Q. State what, in your opinion, is a fair appraisal of Joe Strecker as a resident of Hot Springs?

A. Well, of course you understand all I can say is with reference to the dealings with him in a business way. In that way I can truly say that Joe has been just as square with us and very satisfactory in every way.

95 Q. Do you consider Mr. Strecker as an undesirable resident of Hot Springs?

A. He is just as desirable and more so as far as I can see as some of the citizens of Hot Springs. I have never heard or seen anything of Joe that would disqualify him.

Inspector L. B. STANALAND:

Q. Did you ever discuss politics with Joe?

A. No, sir.

Q. Do you know whether he was a member of the Communist Party?

A. No.

Q. Did he ever discuss our present Government with you or any form of government?

A. No.

Q. You would have no way of knowing his political views?

A. In the banking business we try to stay clear of all political talks.

That's all.

VIRGIL EVANS, witness called, sworn, and testified:

By FELIX L. SMITH:

Q. State your name.

A. Virgil Evans.

Q. Where do you live?

A. 1021 West Grand Ave.

Q. State your occupation.

A. Real estate dealer.

Q. You are the son of the former Circuit Judge W. H. Evans, of Benton, Arkansas?

A. Yes.

Q. Are you married?

A. Yes.



Q. How long have you lived in Arkansas?

A. All my life, except two or three years I lived out of the State.

Q. Are you acquainted with Joe Strecker?

A. I am.

Q. How long have you been acquainted with him?

A. About five years.

Q. During this time what has been the extent of your acquaintance with him?

A. I have known him in a business way only.

Q. State what your business relations with him has been.

A. He was a share holder in the National Park Building and Loan Association and I was Secretary of the Association.

Q. I'll ask you to state about how often you have seen Mr. Strecker since you first knew him.

A. On the average of about once a month, I presume, sometimes oftener.

Q. Have you at any time discussed any other than business matters with Mr. Strecker?

A. We have probably had some casual discussions, but any other than that, I don't recall anything.

Q. Have you ever been in Mr. Strecker's home?

A. No.

Q. Have you ever heard Mr. Strecker manifest any ill will against any constituted United States Government or any other form of government?

A. I have not.

Q. Have you ever heard that Mr. Strecker was a member of the Communist Party?

A. I have not.

Q. Upon your acquaintance with him I'll ask you to state what your opinion is of the man as a resident of Hot Springs?

A. My experience with him has been that he is a reliable, good, and trustworthy.

Q. Do you consider Mr. Strecker as an undesirable resident of the city?

A. Of my contact with him I would judge that he is not.

Q. Have you ever known anything against the moral character of Mr. Strecker?

A. Not at all.

Inspector L. B. STANALAND:

Q. You stated that from your contact with Mr. Strecker you believed him to be a desirable resident. What do you base this on?

A. Well, my contact has all been of the business nature. He impresses me that he is a man that has saved some money and is trying to get along.

Q. Did Mr. Strecker ever discuss politics with you?

A. No.

Q. He has never visited at your home and neither you at his?

A. No, sir.

Q. You would have no way of knowing whether Mr. Strecker is a Republican, Democrat, or Communist?

A. None other than in the business way.

Q. Do you ever see him distributing any literature for any candidate?

A. No.

FELIX L. SMITH:

Q. Do you consider Mr. Strecker radical?

A. From my experience I would say not.  
That's all.

Mr. JOE STRECKER re-introduced and made the following statement:

I want to remain in the United States as this is where I made  
98 my money, where I want to spend it and where I want to die and  
I want no other country but the United States.

Certified correct, May 24, 1934.

L. B. STANALAND.

*Immigrant Inspector.*

*Exhibit 7*

# Warrant--Deportation of Alien

UNITED STATES OF AMERICA,

DEPARTMENT OF LABOR,

*Washington.*

34035/137.

No. 55848/822.

Received 9 Aug. 20, 1934. U. S. Immigration Service, New Orleans.

To:—District Director of Immigration and Naturalization, New Orleans, La.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, from proofs submitted to me Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien Joseph George Strecker alias Joe Strecker, who entered the United States at New York, N. Y., ex S. S. "Bremen," on ----- the 7th day of November, 1912, is subject to deportation under Section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to-wit: The act of October 16, 1918, as amended  
99 by the act of June 5, 1920, in that he believes in and teaches  
the overthrow by force and violence of the Government of the United States; that he is a member of an organization, association, society or group that believes in, advises, advocates and

teaches the overthrow by force and violence of the Government of the United States; that he is a member of an organization, association, society or group that writes, publishes and circulates written or printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States; and that after entry he became a member of one or more of the classes of aliens enumerated in Section 1 of the aforementioned Act, as amended, to-wit; aliens who are members of an organization, association, society or group that believes in, advocates and teaches the overthrow by force and violence of the Government of the United States.

I, Turner W. Battle, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to deport the said alien to Poland, at the expense of the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1935," including the expenses of an attendant, if necessary. Delivery of the alien and acceptance for deportation will serve to cancel the outstanding appearance bond.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 14th day of August 1934.

[SEAL]

(Signed) TURNER W. BATTLE,  
*Assistant to the Secretary of Labor.*

100 In United States District Court, Eastern District of Louisiana,  
New Orleans Division

No. 983 Law

UNITED STATES OF AMERICA, EX REL JOSEPH GEORGE STRECKER,

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION &  
NATURALIZATION, ETC.

*Judgment*

Filed July 30, 1937

This cause came on at a former day to be heard upon the petition of the relator for a writ of habeas corpus herein and after hearing arguments of counsel for the respective parties, the matter was submitted and the Court took time to consider:

Whereupon, and on due consideration thereof:

It is Ordered, Adjudged, and Decreed that the application of the Relator for a writ of Habeas Corpus herein be denied, and that the said petition be and the same is hereby dismissed;

It is Further Ordered that the relator Joseph George Strecker be remanded to the custody of the Immigration authorities to be dealt with according to law.

(Signed) WAYNE G. BORAH, *Judge.*

New Orleans, Louisiana, July 30th, 1937.

In United States District Court

*Petition for appeal*

Filed Sept. 21, 1937

*To the Honorable the Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:*

The petition of Joseph George Strecker, Relator, in the above entitled and numbered cause, with respect represents:

## I

That there is error in the prejudice of Relator in the judgment rendered herein on the 3rd day of July 1937, discharging the alternative writ of habeas corpus as to said Relator and denying the writ of habeas corpus applied for as will appear by the assignment of errors attached to this petition and forming part hereof.

## II

Petitioner further alleges that he has been aggrieved by the said judgment and desires to appeal therefrom.

Wherefore, the premises considered, petitioner prays that he may be allowed to appeal herein to the United States Circuit Court of Appeals for the Fifth Circuit returnable within thirty days from this day at New Orleans, upon Relator giving bond in the sum of ----- conditioned as the law directs and that your petitioner, Relator, be admitted to bond pending the decision of this cause on appeal and that all proceedings under the order of deportation of the Department of Labor be stayed until said appeal be determined and that a  
 102 citation and a copy of the order herein made be served upon Eugene Kessler, or Assistant District Director of Immigration and Naturalization, New Orleans, Louisiana, and

For all general and equitable relief.

(Signed) C. A. STANFIELD,  
*Attorney for Petitioner.*

In United States District Court

*Order allowing appeal*

Filed Sept. 21, 1937

As prayed for an appeal with supersedeas is herein allowed petitioner (Relator) to the United States Circuit Court of Appeals for the Fifth Circuit, returnable according to law upon Relator giving bond in the sum of Two Hundred and Fifty Dollars conditioned as the law directs.

(Signed) WAYNE G. BORAH, *Judge.*



## In United States District Court

*Assignment of errors*

Filed Sept. 21, 1937

1. Now comes the petitioner in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 30th day of July 1937.

2. The Court erred in not holding that the introduction into  
103 the record of the Department of Labor's deportation proceedings, held on January 23, 1934, and May 24, 1934, by Inspectors I. H. Vincent and L. B. Stanaland of the Department of Labor, respectively, of the card purporting to show that the petitioner had been a member of the Communist Party, was an abuse of discretion constituting a denial of due process of law, since the undisputed evidence was to the effect that said card had been obtained by an illegal search and seizure, over the objections of the petitioner and in violation of his rights.

3. The Court erred in not holding that the introduction into the record of evidence purporting to show that the Communist Party did, in 1934, advocate to overthrow by force or violence the United States Government or other forms of organized government was a capricious abuse of discretion amounting to a denial of due process of law; since the undisputed evidence was that the petitioner had not been a member of the Communist Party for two years prior to that date.

4. The Court erred in not holding that the introduction of the transcripts of the two hearings conducted by Mr. Walter L. Wolf and Mr. Carrol D. Paul, officers of the Department of Labor, on September 16, 1933, and October 25, 1933, respectively, constituted a denial of a fair and impartial hearings. The undisputed evidence was that the petitioner was taken into custody by local police officers and conducted by them to the hearings; that they remained present throughout the hearings; that the Hot Springs police officers had a reputation for being brutal and merciless administrators of the "third degree," and that the petitioner was frightened and intimidated; that  
104 the petitioner was not advised of his right to counsel; that petitioner was not allowed counsel; and that petitioner was forced to sign one of the statements without being given the opportunity to read what was there written. Petitioner objected to the transcripts and testified that they were incorrect transcriptions of his statements. The introduction of said transcripts into the record of the deportation proceedings was an abuse of discretion which amounted to a denial of due process of law.

5. The Court erred in not granting the writ and discharging petitioner because of hearsay testimony introduced at the deportation hearings held on January 23, 1934 and May 24, 1934, in that the

alleged statements of petitioner, taken by Mr. Walter L. Wolf and Mr. Carrol D. Paul, were introduced at said hearing in the absence of said Walter L. Wolf and Carrol D. Paul, and said statements were not identified, and petitioner was deprived of his right to cross examine the said officers; and because of the introduction into the record of the deportation hearings of the excerpts of the alleged Communist periodical, which were hearsay in that they were not identified, nor was it shown that said periodical was published by or contained the teachings or opinions of the Communist Party; and because the testimony of witness, Mrs. Levering, taken at the deportation hearings as to the character of the literature by what her granddaughter had told her, and none of the literature was introduced into the record; and because the statement of witness, Dave Brown, introduced into the record of the deportation hearings is hearsay in that the witness was not produced to identify his statement nor for the purpose of cross examination; and because the authors of the transcripts of the hearsay evidence were not introduced as witnesses to enable the petitioner to cross examine them.

105 6. The Court erred in not granting the writ and discharging the petitioner because if the evidence procured by unlawful search and seizure, the statements of petitioner illegally secured and incorrectly transcribed, the hearsay and incompetent evidence, and the evidence as to the nature of the Communist Party in 1934 (when the petitioner is not alleged to have been a member) are excluded from the record of the deportation proceedings, there remains no evidence to sustain the findings of the Department of Labor. When any part of the said illegal evidence is excluded there remains insufficient evidence to sustain the findings.

7. The Court erred in not holding that the evidence was insufficient to sustain the findings. Considering the whole record, there is no evidence that the petitioner believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; or that he belongs to an organization, party, or society that does; or that the Communist Party does; or that the Communist Party writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published, or displayed, written or printed matter advising, advocating, or teaching the overthrow by force or violence of the Government of the United States. There is no evidence that petitioner, after his entry into the United States, became a member of an organization holding these proscribed views or engaging in these proscribed activities.

106 8. The Court erred in not granting the writ and discharging petitioner because the warrant of deportation is void since it directs the deportation of petitioner to Poland. Petitioner is a citizen of Austria, has never resided in Poland, has never been patriated by Poland, and there is no law authorizing his deportation to Poland.

9. The Court erred in not granting the writ and discharging the petitioner because the Department of Labor has misconstrued the

law. The recommendation that he be deported to Austria is based upon a finding that he has been a Communist. The law does not authorize the deportation of an alien because he is a Communist.

10. The Court erred in not maintaining the writ of Habeas Corpus and in not discharging the petitioner because the warrant of deportation was issued without according the petitioner a fair hearing as provided by law and the rules of the Department of Labor; the Department has incorrectly construed the Immigration Laws and Rules; there is not sufficient evidence in the record to sustain the findings contained in the warrant of deportation; the warrant of deportation is void; the Department of Labor has been guilty of such abuse of discretion as to deny due process of law.

11. Wherefore, petitioner and appellant prays that the judgment, decree, and order in said cause be reversed and the cause remanded, with instructions to the Trial Court as to further proceedings therein, and for such other and further relief as may be just in the premiss.

(Sgd.) C. A. STANFIELD,

*Attorney for Appellant, Petitioner.*

107 NOTE.—A cash deposit in the sum of \$250.00 has been posted with H. J. Carter, Esq., Clerk, U. S. District Court, Eastern District of Louisiana, in lieu of Appeal Bond.

In United States District Court

*Praecepta for transcript of record*

Filed Dec. 13, 1937

Praecepta of Documents To Be Included in Transcript.

1. Petition for Habeas Corpus.
2. Order.
3. Answer.
4. Agreed Statement of Facts.
5. Exhibit I, Warrant of arrest introduced in evidence as Ex. No. 3.
6. Exhibit II, Record of Labor Department, hearing held January 23, 1934. Introduced in evidence as Government's Exhibit No. 4.
7. Exhibit III, Report of Carrol D. Paul, introduced in evidence as Government's Exhibit No. 5.
8. Exhibit IV, Membership Book No. 2844 of the Communist Party, introduced in evidence as Government's Exhibit No. 6.
9. Exhibit V, Report of Walter L. Wolf, introduced in evidence as Government's Exhibit No. 7.
- 108 10. Exhibit VI, Record of Labor Department hearing of May 8, 1934, containing excerpts from a magazine, "The Communist," date April, 1934, and other evidence introduced in evidence here as Government's Exhibit No. 9.
11. Exhibit VII, Warrant of Deportation to Poland.

12. Judgment, denying application for writ of habeas corpus and dismissing petition.

13. Petition for Appeal and order allowing same.

14. Assignment of Errors.

15. Certificate of Clerk that cash deposit in lieu of bond had been posted, and of authenticity of record.

(Signed) C. A. STANFIELD,  
*Attorney for Relator.*

109 [Clerk's certificate to foregoing transcript omitted in printing.]

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

\* \* \* \* \*

110 In United States Circuit Court of Appeals for the Fifth  
Circuit

No. 8680

JOSEPH GEORGE STRECKER

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND  
NATURALIZATION

*Argument and submission*

March 21, 1938

On this day this cause was called, and, after argument by C. A. Stanfield, Esq., for appellant, and Leon D. Hubert, Jr., Esq., Assistant United States Attorney, for appellee, was submitted to the Court.



111 In United States Circuit Court of Appeals for the Fifth Circuit

No. 8680

JOSEPH GEORGE STRECKER, APPELLANT

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND  
NATURALIZATION, APPELLEE

Appeal from the District Court of the United States for the Eastern  
District of Louisiana

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

*Opinion of the court*

Filed April 6, 1938

HUTCHESON, Circuit Judge: Appellant, an alien, was held for deportation, upon a warrant finding him subject to deportation; under the Act of October 16, 1918, as amended by the Act of June 5, 1920, in that he believes in and teaches, is a member of an organization that believes in, advises, advocates, and teaches, is a member of an organization that writes, publishes, and circulates written or printed matter advising and teaching, the overthrow by force and violence of the government of the United States, and that after entry,

112 he became a member of such an organization, society, or group.

He applied for and obtained a writ of habeas corpus upon Eugene Kessler, District Director, who had him in custody. Afterwards, upon a hearing, there was an order discharging the writ, and remanding appellant for deportation. This appeal tests whether that order was rightly entered.

Appellant contends both that the hearings upon which the deportation order was based were so unfair as to constitute a denial of justice, and that the findings are without support in the evidence.

We find nothing essentially unfair about the hearings; as deportation hearings go, they were conducted with ordinary fairness. We agree with appellant, however, that the purported finding that he believes in and teaches, and belongs to or did belong to, an organization which believes in and teaches the overthrow by force and violence of the Government of the United States, is without any support in the evidence, is a mere fiat. The proceedings as a whole, and the questioning and summary in particular, are dramatic illustrations of the tyranny of labels over certain types of mind. The evidence, and the only evidence relied on for the finding and order is that during the Presidential campaign of 1932, when one Foster was running as the white, and one Ford as the colored candidate of the Communist Party of America, for President of the United States, appellant, in

November 1932, became a member of the Communist Party and accepted certain literature of the Communist Party for distribution. He testified that he was a member of the Communist Party of America until February 1933, when he quit paying his dues, and that since that time he has not been a member. He did not testify, nor did any one else, that he believed in the overthrow by force and violence of the

Government of the United States, neither did he, nor any one else, testify that the organization he had belonged to, the Communist Party of America, taught, advocated, or incited such overthrow. None of the literature which he was supposed to have circulated in 1932 was introduced, but his book of membership in the Communist Party in the United States was. Not a word in this membership book advocated, incited, or even suggested that the Government of the United States should be overthrown by force or violence. It did teach that the party is the vanguard of the working class; that it incorporates the whole body of experience of the proletarian struggle basing itself upon the revolutionary theory of Marxism, and representing the general and lasting interests of the whole of the working class. The record contained also, offered by the Bureau, extracts from a copy of the "Communist", dated April 1934, "8th Convention issue, a magazine of the theory and practices of Marxism and Leninism, published monthly by the Communist Party in the United States of America." Not a single extract from this magazine referred to the Government of the United States of America directly or indirectly. There is a discussion in it of Austro-Marxism. There is, too, the cynical suggestion that the proletariat should learn the sly ways of the bourgeoisie to become masters of politics and of laws, so that "legality" instead of "killing the proletariat," would "kill the bourgeoisie," and the statement that the final overthrow of Capitalism could not be accomplished without a mobilization of the workers for the struggle against it. There is too, the general statement that the question of a violent revolution lies at the root of the whole of Marx's teachings, and that only philistines or downright opportunists can talk about revolution without violence.

The evidence for Strecker makes him out a small bourgeoisie, a merchant, with a little capital, some canniness, a fair amount of human kindness, some bad habits, and apparently no quarrel with the Government of the United States, but only with what he regards as the evils of Capitalism as such, and with grafters holding Government offices. He flatly denies, and no one disputed him, that he has ever taught or believed in the unlawful destruction of property, or the overthrow by force of the United States Government, and in answer to the question, "Just what do you believe in in the way of government," replied, "I believe it is best like we have it here. We have a good constitution for the people by the people. We have a lot of grafters, as you know, that should be gotten rid of." He testified that he was not an anarchist, that he was not opposed to the United States Government, and that he never knowingly joined an organization the purpose of which was to destroy the government. All of the

literature he received when he joined in November, as he recalled it, was political, such as "Vote Communist in the November election"; that he never believed in nor taught sabotage, or the killing or assaulting of officers because they were officers. All that was proven against Strecker was that in 1932 he joined the Communist Party, and that he answered a foolish question—"Supposing that the majority of the populace of the United States were Communists, and were certain of a victory over Capitalism in an armed conflict, would you then personally bear arms against the present Government?" foolishly, according to its folly—"Certainly; I would be a fool to get myself killed fighting for Capitalism." This proof does not support the finding on which the warrant was based.

The statute under which these proceedings were instituted was enacted in 1918 and amended in 1920, to meet a situation caused by the crisis in Russia in 1918 and 1919, and the propaganda following that crisis for the overthrow of governments by force. It was 115. enacted to enable the United States to expel from its shores aliens seeking a footing here, to propagandize and proselytize for direct and violent action. The decisions of the Circuit Courts of Appeal in *Skeffington vs. Katzev*, 277 Fed. 129; *Antolish vs. Paul*, 283 Fed. 957; *Ungar vs. Seaman*, 4 Fed. (2d) 8, on the authority of which it was held in *Ex Parte Villarino*, 50 Fed. (2d) 582; *Kjar vs. Doak*, 61 Fed. (2d) 566, upon which the appellee relies here, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience, and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute.

Much water, socially and politically, has gone under the bridge since 1920. Russia itself is more vigorously organized than almost any other country in the world; to prohibit and suppress those who teach and preach the overthrow of government by force. In this country, in the Presidential elections of 1932 and of 1936, the Communist Party, seeking by political means, rather than by violence, to remake the United States according to its heart's desire, into a government of the proletariat, by the proletariat, and for the proletariat, had a candidate for President. Nothing in our Constitution or our laws forbids the formation of such a party, or persons from joining them. The statute invoked here does not forbid membership in the Communist, or in any other party, except one which teaches the overthrow by force and violence, of the government of the United States.

It seems to me to be a kind of Pecksniffian righteousness, savoring strongly of hypocrisy and party bigotry, to assume, and find that merely because Strecker joined the Communist Party of 116 America, he is an advocate of or belongs to a party which advocates the overthrow by force and violence of the Govern-

ment of the United States. It seems to me, too, that the cause of Liberalism is more retarded than advanced by forays for deportation on evidence like this. But whatever may be thought to be the propriety, from the standpoint of tolerance and liberalism, of this proceeding, it may not be doubted that from the standpoint of its legality, a deportation order requires more than a mere fiat. There must be evidence in the record supporting the finding, on which the order rests. Such evidence is wanting here.

The order is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

HOLMES, Circuit Judge, concurs in the result.

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In United States Circuit Court of Appeals

No. 8680

JOSEPH GEORGE STRECKER

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND  
NATURALIZATION

*Judgment*

April 6, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

HOLMES, Circuit Judge, concurs in the result.

118

In United States Circuit Court of Appeals for the Fifth  
Circuit

[Title omitted.]

*Petition for rehearing*

Filed April 26, 1938

*To the Honorable, the Judges of the United States Circuit Court for  
the Fifth Circuit:*

The petition of the United States of America, respondent and appellee, appearing herein through Rene A. Viosca, United States Attor-



ney, and Leon D. Hubert, Jr., Assistant United States Attorney, with respect represents that:

## I

The opinion and decree rendered in this cause on the 6th day of April 1938, is erroneous and contrary to the law and the evidence, and prejudicial to the interests of your petitioner, and a rehearing should be granted in this matter for the following reasons to-wit:

119

## II

The Court is in error in holding that there was insufficient evidence produced at the hearings accorded the relator to justify the conclusion on the part of the Secretary of Labor that the subject believes in the overthrow by force and violence of the Government of the United States, in that the Court in its opinion said that the only evidence bearing upon this point was the following question and answer:

"Q. Supposing the majority of the populace of the United States were Communists and were certain of a victory over capitalism in an armed conflict, would you then personally bear arms against the present Government?

A. Certainly; I would be a fool to get myself killed fighting for capitalism."

whereas, the following colloquy between the defendant and examining agent which the Court held was properly admitted in evidence, appears from the record (Tr. pages 49, 50, and 51):

"Q. Are you in accord with Marx in regard to the social order of things?

A. Yes.

Q. Will you tell me what the aims and purposes of the Communist Party of America are?

A. Yes; it proposes to destroy capitalism and establish a Government by the people.

Q. Do you mean a Government similar to that now in existence in Russia?

A. Exactly.

Q. What means will the Communist Party of America use to attain its purpose?

120 A. I do not know what will be necessary.

Q. Will it resort to armed force in the event that should be necessary?

A. That is what they say.

Q. Who says that?

A. The leaders of Communism.

Q. Do you mean the local leaders, the national leaders, or those in Russia?

A. All of them.

Q. Do you think that the present form of Government in the United States should be destroyed and a Communistic or Russian form of Government established in the United States?

A. I think that the destruction of capitalism is inevitable and that the sooner it comes the better off we shall all be.

Q. Would you personally bear arms against the present U. S. Government?

A. Not at this time.

Q. Why not at this time?

A. Because Communism is not strong enough now."

It is respectfully submitted that this colloquy shows clearly that the relator believed in the use of force for the overthrow of the Government and the establishment of a Communist form of Government, but that he did not believe that the time was ripe at the present.

### III

The Court is in error in holding that the cases of Skeffington v. Katzeff, 277 F. 129; Antolish v. Paul, 283 F. 957; Ungar v. Seaman, 4 F. (2d) 80, Ex Parte Vilarino, 50 F. (2d) 582; Kjar v. Doak, 61 F. (2d) 566, do not represent the jurisprudence today as to whether membership in the Communist Party is sufficient to warrant 121 deportation. In the following recent cases it was held that membership in the Communist Party of America is sufficient to warrant deportation: United States v. Perkins, 79 F. (2d) 533 (2 C. C. A., 1935), In re: Sarderquist, 11 Fed. Supp. 525 (D. C. Maine, 1935), affirmed by the 1st Circuit without opinion, 83 F. (2d) 890 (1936); Branch v. Cahill, 88 F. (2d) 545 (9 C. C. A., 1937). It is submitted therefore that the Court is squarely in conflict with other circuits in its holding that membership in the Communist party today is insufficient to warrant deportation.

Wherefore, the premises considered, petitioner prays that after due consideration a rehearing be granted in this case in order that the above matters may be more fully discussed, and finally, that the judgment of the District Court be affirmed.

And for all general and equitable relief.

RENE A. VIOSCA,

*United States Attorney.*

LEON D. HUBERT, Jr.,

*Asst. United States Attorney.*

[Duly sworn to by Leon D. Hubert, Jr.; jurat omitted in printing.]

122 In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

*Opinion on motion for rehearing and dissenting opinion by Sibley, Circuit Judge*

Filed June 7, 1938

PER CURIAM: The judgment of reversal is amended to read, "Reversed, with directions to try the issues de novo as suggested in Ex Parte Fierstein, 41 Fed. (2d) p. 54."

123 The motion for rehearing is denied.

SIBLEY, Circuit Judge, dissents.

SIBLEY, Circuit Judge, dissenting:

I think a rehearing should be granted, especially to consider the significance of the references to the Third Communist International contained in the membership book issued to Strecker by the Communist Party of the U. S. A. and the question whether the objectives and programs of the two named organizations can be judicially noticed. Neither of these things was argued before us nor considered in deciding the case, and they might lead to a different result.

The membership book for which Strecker paid, which was issued in his name, was received and read by him, and on which he paid dues for two months and which he retained in his possession after ceasing to pay dues without any resignation or repudiation of his membership, contains these statements: "A member of the Party can be every person \* \* \* who accepts the program and statutes of The Communist International and the Communist Party of the U. S. A. \* \* \* who subordinates himself to all decisions of the Comintern and of the Party \* \* \*" "The Communist Party, like all Sections of the Comintern, is built upon the principles of democratic centralization. These principles are \* \* \* immediate and exact applications of the decisions of the Executive Committee of the

124 Communist International and of the Central Committee of the Party \* \* \*. After a decision has been adopted at the Congress of the Comintern \* \* \* it must be carried out unconditionally, even if some of the members of the local organization are not in agreement with the decision." "The Party \* \* \* incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism \* \* \*. The Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action." It thus appears that the Communist Party of U. S. A. and its members are affiliated with, nay more, are subject to the Communist International of Moscow and adopt its

program and statutes. There is express reference to the "revolutionary theory of Marxism."

Now a court, and equally the Secretary of Labor, may notice without proof what is generally notorious in the community. This does not mean that everyone actually knows it, but that ordinarily well informed persons do. Among such things so noticed are general and local current history. And this includes the organization and objectives of political parties. 23 C. J., Evidence, § 1937; State vs. Wright, 251 Mo. 325, 158 S. W. 823; State vs. Kortjohn, 246 Mo. 34, 150 S. W. 1060; Rider vs. County Court, 74 W. Va. 712; Porter vs. Flick, 60 Neb. 773. It is known to me, not from research, but from general information at the time and since, that the Third Communist International was organized just after the World War and in connection with the Russian Revolution as an international organization of those who believe that private property should be abolished and the essentials of wealth and production vested in a government controlled only by the proletariat, and that the accomplishment of this by peaceful means is impractical and that the "direct action" of revolution must be resorted to; and to this end all capitalistic governments must be thus overthrown, and the workers of the world must unite. In the same way I know that the Socialist Party in the United States, which seeks change by constitutional means, was about this time divided, and the "left wing," which insisted on "direct action," separated from it and became the Communist Party of the U. S. A. and joined the Third Communist International. If this was all knowable by the Secretary, in connection with the evidence in the record, there would be a sufficient basis for him to conclude as a fact that Strecker became a member of or at least affiliated with an organization that advises, advocates and teaches the overthrow by violence of the Government of the United States, as one of the capitalistic governments, within the provision of § U. S. C. A. § 137 (c). The opinion of this Court in fact resorts to judicial notice in its remarks about recent changes in the methods of the Communist Party and in Soviet Russia. But no one professes to know that the Communist International had in 1933 changed its program, or indeed that the Communist Party of the U. S. A. at that time had. No one doubts that the economic aims of Communism may be lawfully promoted by a citizen or an alien in the United States, so long as they are sought to be attained by peaceable means. But the advocacy of attainment by force and violence is outlawed, because laying the foundation for treason. A rehearing ought to be had.



126

In United States Circuit Court of Appeals

No. 8680

JOSEPH GEORGE STRECKER

vs.

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND  
NATURALIZATION*Amended judgment*

June 7, 1938

The judgment of reversal is amended to read, "Reversed, with directions to try the issues de novo as suggested in Ex Parte Fierstein, 41 Fed. (2d) p. 54."

SIBLEY, Circuit Judge, dissents.

127

In United States Circuit Court of Appeals

[Title omitted.]

*Order denying rehearing*

June 7, 1938

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

SIBLEY, Circuit Judge, dissents.

128 In United States Circuit Court of Appeals for the Fifth  
Circuit

[Title omitted.]

*Petition<sup>3</sup> for stay of mandate*

Filed June 16, 1938

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now into Court comes the United States of America, through Rene A. Viosca, United States Attorney for the Eastern District of Louisiana; and Leon D. Hubert, Jr., Assistant United States Attorney for the Eastern District of Louisiana, and with respect shows that:

129

I

Your petitioner desires a stay of the mandate to be rendered in the above named and entitled matter for a period of thirty (30) days

pending which your petitioner desires to apply to the United States Supreme Court for a writ of certiorari;

Wherefore, the premises considered, petitioner prays that order be issued staying the issuance of the mandate in the above named matter for a period of thirty (30) days from the instant date.

(Signed) LEON D. HUBERT, Jr.,  
Assistant United States Attorney.

New Orleans, Louisiana, June 16, 1938.

[Duly sworn to by Leon D. Hubert, Jr., jurat omitted in printing.]

130 In United States Circuit Court of Appeals for the Fifth.  
District

[Title omitted.]

*Order staying issuance of mandate*

On consideration of the application of the United States in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable it to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 16th day of June 1938.

(Signed) RUFUS E. FOSTER,  
United States Circuit Judge.

131 In United States Circuit Court of Appeals for the Fifth  
Circuit

[Title omitted.]

*Petition to set aside judgment rendered June 7, 1938, and for a rehearing*

(Filed June 27, 1938)

*To the Honorable, the Judges of the United States Circuit Court for the Fifth Circuit:*

The petition of the United States of America, respondent and appellee, appearing herein through René A. Viosca, United States

Attorney, and Leon D. Hulbert, Jr., Assistant United States Attorney, with respect represents that:

## I

The per curiam opinion of the Court rendered on June 7, 1938, which reads as follows:

"The judgment of reversal is amended to read, 'Reversed, with directions to try the issues de novo as suggested in *Ex parte Fierstein*, 41 Fed. (2d) 'p. 54'."

132 is erroneous and should be recalled and set aside for the following reason to-wit:

## II

It is well settled that in a habeas corpus proceeding concerning a deportation matter, the trial court is not a fact finding tribunal, but simply inquires into and passes upon the questions of whether there has been a fair hearing and whether the conclusions are supported by evidence. *Tisi v. Tod*, 264 U. S. 131; *Vajtauer v. Commissioner*, 273 U. S. 103; *Bilokumsky v. Tod*, 263 U. S. 149; *Ng Fung Ho v. White*, 259 U. S. 276. In the case of *Lindsey v. Dobra*, 62 F. (2d) 116, *Certiorari denied* 288 U. S. 696, this Court said:

"The taking in the District Court of additional evidence on the merits was excepted to. Though the evidence adduced does not appear to be of controlling importance, we must hold its reception to be improper. Aside from questions of citizenship or coercion or fraud in the hearing, a retrial of fact issues on new evidence is not in order. *Exedahtelos v. Fluckey* (6 C. C. A.) 54 F. (2d) 858."

Accordingly, it is submitted that the trial court cannot take further evidence in the matter, and that therefore a trial de novo would be a vain and useless proceeding since the Court would be obliged to pass upon the same record which was before it at the original hearing.

Wherefore, the premises considered, petitioner prays that after due consideration the per curiam opinion hereinabove referred to be recalled and set aside, and that a rehearing be granted in order  
133 that these matters as well as the matters set forth in the first petition for a rehearing filed on behalf of the respondent herein be more fully discussed to the end that the judgment of the District Court be affirmed.

And for all general and equitable relief.

RENE A. VIOSCA,

United States Attorney.

LEON D. HUBERT, Jr.,

Asst. United States Attorney.

[Duly sworn to by Leon D. Hubert, Jr.; jurat omitted in printing.]

In United States Circuit Court of Appeals  
For the Fifth Circuit

[Title omitted.]

*Petition for additional stay of mandate*

Filed July 13, 1938.

*To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:*

Now, into Court comes the United States of America, through Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and Robert W. Weinstein, Assistant United States Attorney for the Eastern District of Louisiana, and with respect shows that:

I

Your petitioner desires a stay of the mandate to be rendered in the above named and entitled matter for an additional period of thirty (30) days pending which your petitioner desires to apply to the United States Supreme Court for a writ of certiorari;

Wherefore, the premises considered, petitioner prays that order be issued staying the issuance of the mandate in the above named matter for an additional period of thirty (30) days from July 16, 1938.

(Signed) ROBERT W. WEINSTEIN,

*Assistant United States Attorney.*

New Orleans, Louisiana, July 8, 1938.

[*Duly sworn to by Robt. W. Weinstein; jurat omitted in printing.*]

In United States Circuit Court of Appeals  
For the Fifth District

[Title omitted.]

*Order staying issuance of mandate*

On consideration of the application of the Appellee in the above numbered and entitled cause for an additional stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for an additional period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from July 16, 1938, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is fur-



ther ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from July 16, 1938, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 13 day of July, 1938.

(Signed) RUFUS E. FOSTER,  
*United States Circuit Judge.*

137. In United States Circuit Court of Appeals

[Title omitted.]

*Order denying petitions to set aside judgment*

July 27, 1938

The petition to set aside the judgment of this Court is DENIED.

138 In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]

*Petition for stay of mandate*

Filed Aug. 16, 1938

*To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:*

Now into Court comes the United States of America, through Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and Leon D. Hubert, Jr., Assistant United States Attorney for the Eastern District of Louisiana, and with respect shows that:

139 I.

Your petitioner desires a stay of the mandate to be rendered in the above named and entitled matter for an additional period of twenty-three (23) days pending which your petitioner desires to apply to the United States Supreme Court for a writ of certiorari;

Wherefore, the premises considered, petitioner prays that order be issued staying the issuance of the mandate in the above named matter for an additional period of twenty-three (23) days from August 16, 1938.

(Signed) LEON D. HUBERT, JR.,  
*Assistant United States Attorney.*

New Orleans, Louisiana, August 16, 1938.

[Duly sworn to by Leon D. Hubert, Jr., jurat omitted in printing.]

## 140 In United States Circuit Court of Appeals for the Fifth District

[Title omitted.]

*Order staying issuance of mandate*

On consideration of the application of the United States in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable it to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of twenty-three days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within twenty-three days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of twenty-three days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 16 day of August, 1938.

(Signed) RUFUS E. FOSTER,

*United States Circuit Judge.*

141 [Clerk's certificate to foregoing transcript omitted in printing.]

142 Supreme Court of the United States

*Order allowing certiorari*

Filed October 17, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 42,815. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 330. Eugene Kessler, District Director of Immigration and Naturalization, Petitioner, vs. Joseph George Strecker. Petition for a writ of certiorari and exhibit thereto. Filed September 7, 1938. Term No. 330 O. T. 1938.



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**No. 880**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRA-  
TION AND NATURALIZATION, PETITIONER**

**v.**

**JOSEPH GEORGE STRECKER**

**PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**



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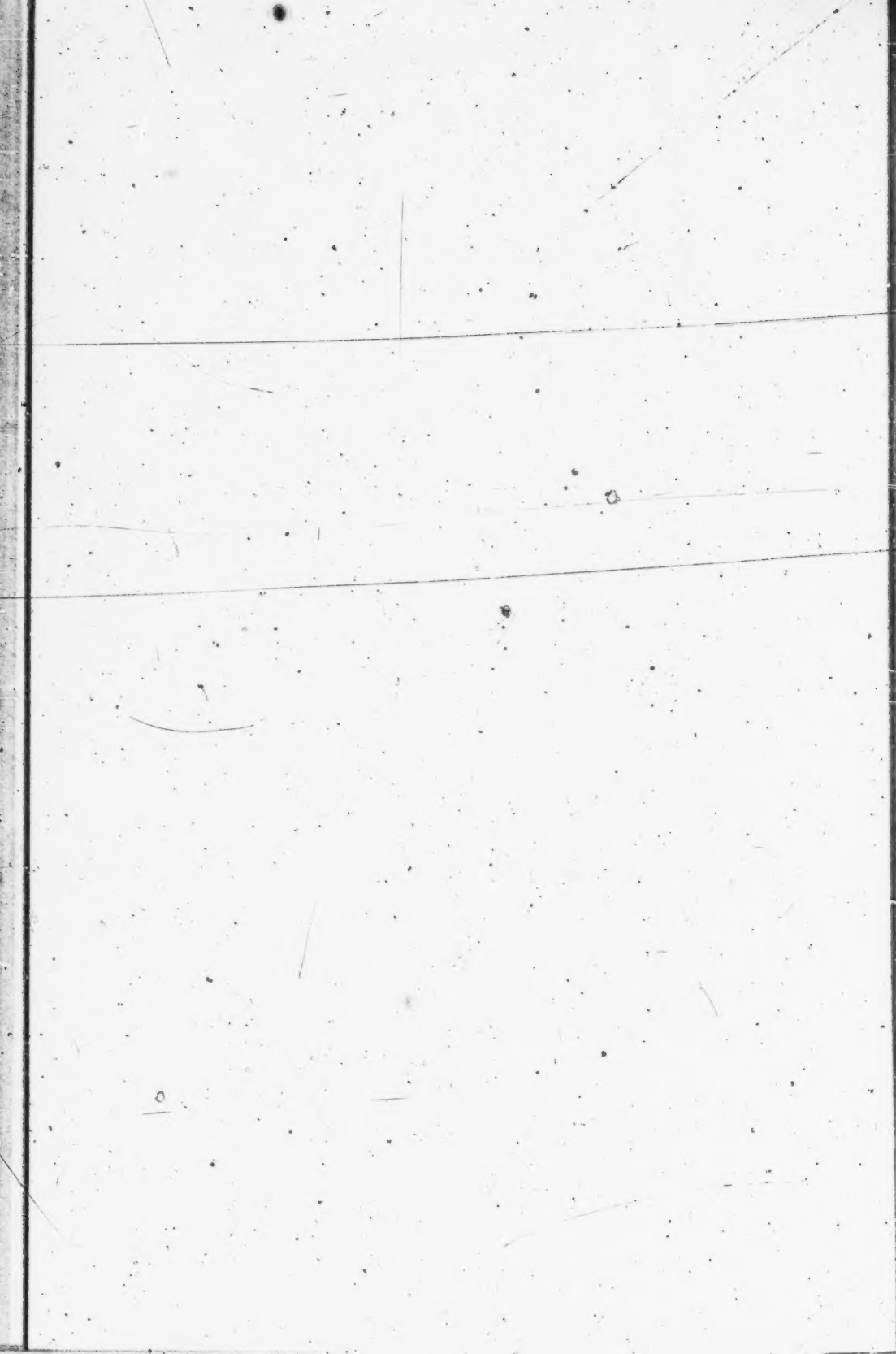
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(1)





# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

**No. 330**

**EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER**

**v.**

**JOSEPH GEORGE STRECKER**

---

## **PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on April 6, 1938, and amended on June 7, 1938.

### **OPINIONS BELOW**

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 110) is reported in 95 F. (2d) 276. The opinion of Sibley, J., dissenting from the denial of rehearing, is printed in the record at p. 117.

## JURISDICTION

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 117). An order denying a petition for rehearing was entered June 7, 1938 (R. 119), and on the same day an order was entered amending the judgment (R. 118). An order denying a second petition for rehearing, which had been filed June 27, 1938 (R. 121), was entered July 27, 1938 (R. 124). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States.

## STATUTE INVOLVED

The relevant provisions of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 15, 1920, c. 251, 41 Stat. 1008 (U. S. C., Title 8, Sec. 137), are as follows:

That the following aliens shall be excluded from admission into the United States:

\* \* \* \* \*

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by

force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage—

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or

causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d).

Section 2 of the Act of October 16, 1918, *supra*, provides:

SEC. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

#### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that an alien who in 1932 became a member of the Communist Party is not by reason of that fact subject to deportation under the Act of October 16, 1918, as amended by the Act of June 5, 1920 (U. S. C., Title 8, Sec. 137).

(2) In holding that the evidence before the Secretary of Labor concerning the principles of the



Communist Party was insufficient to sustain the order of deportation.

(3) In remanding the case for a trial *de novo* in the District Court.

(4) In failing to affirm the judgment of the District Court.

#### STATEMENT

From the agreed statement (R. 8-12) and exhibits the following facts appear: Respondent, a native born subject of Austria, entered the United States in 1912. In 1933 he filed a petition for naturalization, but before completing that process deportation proceedings were begun against him. On November 25, 1933, the Department of Labor issued a warrant for his arrest, charging him with being in the United States in violation of the Act of October 16, 1918, as amended by the Act of June 5, 1920 (U. S. C., Title 8, Sec. 137), in that after his entry he was found to have become a member of one of the classes of aliens enumerated in Section 1 of that Act, as amended, to wit: an alien who is a member of or affiliated with an organization, association, society, or group that believes in, advises, or teaches the overthrow by force and violence of the government of the United States. (R. 8, 12-13.)

Two hearings were afforded respondent under this warrant of arrest. The first was held on January 23, 1934, the respondent being represented by counsel. Evidence introduced by the Govern-

ment in support of the warrant consisted of membership book No. 2844 of the Communist Party of the United States in the name of respondent, a statement made by respondent to an Immigration officer on October 25, 1933 (R. 46-52), and a report of a hearing before the Acting District Director of Naturalization on respondent's application for naturalization (R. 60-67). The second hearing was held on May 8, 1934, respondent again being represented by counsel. The Government offered as additional evidence extracts from a magazine entitled "The Communist" dated April 1934, "a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 69-74). Respondent produced a number of witnesses who testified to his character and beliefs (R. 74-97), and respondent himself testified at both hearings (R. 15-28, 68-69, 81-88, 97-98), denying certain of the statements contained in his earlier testimony before the Immigration officers which had been introduced in evidence at the first hearing.

On the basis of the record of the above hearings the Secretary of Labor, on August 14, 1934, issued a warrant of deportation against respondent (R. 98-99).

The following matter contained in the record of the hearings is relevant on the question whether there was evidence to support the order of deportation.

Respondent admitted that he joined the Communist Party in November 1932 (R. 20, 65). His membership book showed that he had been admitted on November 15 of that year (R. 19-20, 52-53). No dues stamps were affixed to the membership book for any period subsequent to February 1933 (R. 56). The membership book contained the following extract, among others, from the statutes of the Communist Party of the United States (R. 53, 54).

#### SEC. 3—MEMBERSHIP

1. A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

\* \* \* \* \*

#### SEC. 4—THE STRUCTURE OF THE PARTY

1. The Communist Party, like all sections of the Comintern is built upon the principle of democratic centralization. These principles are: \* \* \*

(c) Acceptances and carrying out of the decisions of the higher Party committees by the lower Strict Party discipline, and immediate and exact applications of the decisions

of the Executive Committee of the Communist International and of the Central Committee of the Party.

Under the caption "What is the Communist Party?" the membership book states (R. 59):

The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. (From the program of the Communist International.)

The record of the hearing of October 25, 1933, before an Immigration inspector, introduced at the hearings on the warrant of arrest, shows that respondent testified as follows (R. 50-51): That at the time of his initiation into the Communist Party he was familiar with its intents and purposes; that he acquired prior knowledge of Communism from a study of the writings of Marx over a period of about ten years; that he was in accord with Marx in regard to the social order of things; that the Communist Party of America proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that the leaders of communism say that it will resort

to armed force in the event that it should be necessary; that he would not personally bear arms against the present United States Government "because Communism is not strong enough now."

Among the excerpts read into the record from the periodical "The Communist," published, as stated above, by the Communist Party of America, are the following (R. 73, 74):

"The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor everyday needs as a starting point from which to lead the working class to the revolutionary struggle for power."  
(C. I. Program.)

\* \* \* \* \*

In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the mass political strike and for an armed insurrection of the fight for power, means to disarm the workers in the face of the attack of the bourgeoisie.

\* \* \* \* \*

"The necessity of systematically fostering among the masses this and just this point of view about violent revolution lies at the root of the whole of Marx' and Engels' teachings \* \* \*" [Lenin, State and Revolution.]

\* \* \* \* \*

The question of a violent revolution lies at the root of Marx's teachings. Only phil-



istines or downright opportunists can talk about revolution without violence.

Counsel for respondent was asked at the hearings whether he had any documents or other evidence "in rebuttal of this evidence that your membership in the Communist Party constitutes membership in an organization which believes in or teaches the overthrow by force or violence [of] the Government of the United States or all forms of organized government" (R. 74). The evidence thereupon introduced in behalf of the respondent consisted solely of testimony by himself and acquaintances as to his personal character and beliefs (R. 74-97).

On June 25, 1936, respondent filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Arkansas, based on the same ground as the instant application (R. 9). After hearing the evidence Judge Martineau denied the petition and allowed an appeal. The appeal was never perfected but was docketed and dismissed in the Circuit Court of Appeals for the Eighth Circuit (*ibid.*). The instant proceeding was begun a year later, on June 16, 1937, in the District Court for the Eastern District of Louisiana. On consideration of the evidence Judge Borah denied the application for a writ of *habeas corpus* (R. 100).

On appeal, the Circuit Court of Appeals reversed the judgment and remanded the cause to the District Court (R. 110-113). The Court of

Appeals rejected the contention of respondent that the hearings had been unfair, but held that the record did not support the order of deportation, as it was not shown that the Communist Party is now within the statutory definition of proscribed organizations. The court took judicial notice of the fact that the conditions which called for the statutory provision in 1918 and 1920 had changed in respect of the Russian experience and the record of the party. Holmes, J., concurred in the result. A petition for rehearing was denied on June 7, 1938, but the judgment was amended to provide for a trial of the issues *de novo* in the District Court (R. 118). Sibley, J., dissented from the denial of rehearing, stating that a different result might be reached on consideration of the references to the Communist International in the membership book of respondent, together with ordinary knowledge of the program of the Communist International (R. 117-118).

A second petition for rehearing was filed by the Government (pursuant to leave granted by the senior Circuit Judge) taking the position that a trial *de novo* in the District Court was an improper disposition of the case, and renewing the request for a rehearing. This petition was denied on July 27, 1938 (R. 121-122, 124).

#### REASONS FOR GRANTING THE WRIT

This petition is submitted in order that the Court may resolve the conflict between the decision below

and the decisions of other Circuit Courts of Appeals. The question whether membership by an alien in the Communist Party of America, together with the resulting affiliation with the Communist International, subjects an alien to deportation, was answered by the court below in the negative; as will be shown, other courts have given an affirmative answer. Moreover, the court below regarded the record as lacking in evidence to support a finding that these organizations, at the time of respondent's membership in 1932-1933, advocated or believed in the overthrow of the Government of the United States by force and violence; other courts have sustained orders of deportation on records containing essentially similar evidence.

The lack of uniformity among the circuits will, unless resolved, create a situation both of unfairness to aliens and of confusion in the administration of the law.

The pertinent decisions are stated below by circuits.

*First Circuit:* In *Murdoch v. Clark*, 53 F. (2d) 155 (1931), the alien was a member of the Workers' Party of America, affiliated with the Communist Party, and of the Trade Union Unity League, affiliated with the Red International Labor Union. After quoting excerpts from a pamphlet of the Trade Union Unity League, the court said (p. 157): "The program of the Red International Labor Union and the Communists is now a matter of general knowledge." In *Sorquist v.*

*Ward*, 83 F. (2d) 890 (1936), affirming, on the opinion below, 11 F. Supp. 525, the court relied on excerpts in the record from the report of a Congressional investigating committee and a pamphlet containing the program, constitution, and rules of the Communist International, not materially different in substance from the literature in the present record, and the court added (11 F. Supp. 527): "Membership of an alien in or affiliation with the Communist Party has been held sufficient to support a warrant issued by the Department of Labor for such alien's deportation."

*Second Circuit*: In *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707 (1932), certiorari denied, 287 U. S. 607, it was held that an alien who had joined the Communist Party and was later expelled for disagreement with certain of its principles was nevertheless deportable. The court said (p. 707): "The Communist Party is well known to be a group which advocates the overthrow of organized government by force. No claim is made that aliens who are members of it are not subject to deportation." See also *United States ex rel. Ohm v. Perkins*, 79 F. (2d) 533 (1935); *United States ex rel. Fernandes v. Commissioner of Immigration*, 65 F. (2d) 593 (1933).

*Third Circuit*: In *United States ex rel. Boric v. Marshall*, 67 F. (2d) 1020 (1933), affirming *per curiam* the judgment and opinion below, 4 F. Supp. 965, where the alien was a member of the National Miners Union, shown by documentary evidence to

be affiliated with the Red International of Labor Unions and the Trade Union Unity League, the court sustained an order of deportation, declaring (4 F. Supp. at 967): "It is a matter of common knowledge that the Red International of Labor Unions, and its American branch, Trade Union Unity League, is a body which is opposed to organized government and favors the overthrow of the Government of the United States by force. In numerous decisions by courts judicial notice has been taken of this fact, and the Secretary of Labor has fully as much right to accept common knowledge in this respect as have the courts."

*Seventh Circuit:* In *Kjar v. Doak*, 61 F. (2d) 566 (1932), certain pamphlets were introduced, similar to the literature in the present record. It appeared that the documents had been published prior to the alien's membership in the Communist Party and in the Trade Union Unity League, and objection was made on that ground to their consideration. In disposing of this objection the court said (p. 569): "In the absence of evidence to the contrary, it will be presumed that the organizations referred to continue to advocate and teach the same principles as are set forth in the documents introduced, all of which were published as late as 1929." In the present case the publication of the Communist Party contained in the record is dated a little more than a year subsequent to the alien's last payment of dues to the party. If the decision below be thought to rest on that ground, it is in conflict with



the *Kjar* case, particularly since no attempt was made by respondent to show that the principles of the party had undergone any pertinent change in the interval. See also *Vajtauer v. Commissioner*, 273 U. S. 103, 110-111.

In the *Kjar* case the court stated (p. 569): "Membership of an alien in, or affiliation with, the Communist Party or the Trade Union Unity League has been held sufficient to support a warrant issued by the Department of Labor for such alien's deportation."

*Eighth Circuit*: In *Ungar v. Seaman*, 4~~7~~ F. (2d) 80 (1924), the court stated (p. 81): "It is now settled that the Communist party was an organization that entertained a belief in the overthrow by force or violence of the government of the United States and advocated and taught the overthrow by force or violence of all forms of law." In the *Ungar* case the court ordered a new hearing because of procedural irregularities, but the statement quoted is, of course, part of the law of the case, governing the further proceedings therein, and hence in no sense can be regarded as dictum. Subsequently, in *Jurgans v. Seaman*, 25 F. (2d) 35 (1928), it was conceded that the Communist Party was within the definition of the statute, the alien being represented by the same counsel who had appeared in the *Ungar* case.

*Ninth Circuit*: In *Ex parte Vilarino*, 50 F. (2d) 582 (1931), the nature of the party was held to have

been sufficiently shown by certain publications introduced in evidence,<sup>1</sup> as to which the court said (p. 586):

According to that literature [in evidence], ownership of which was admitted by Vilarino, it is clear that the communists do advocate the overthrow of the government of the United States by force or violence. One or two excerpts from those documents will be sufficient to establish that fact: "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win. Working men of all countries, unite!" (From the Communist Manifesto, by Karl Marx and Frederick Engels, page 58.)

The court then quoted from the membership book of the alien, identical with that in the present case, and concluded: "It is clear from the foregoing that the Communist teaching is one of force; it is equally clear that Vilarino, being able to read English, was aware of his party's teaching." And the court added (p. 586): "The doctrines of this group, indeed, have already been passed upon by this court.

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<sup>1</sup> In the earlier case of *Ex parte Fierstein*, 41 F. (2d) 53 (1930), the court had held that the principles of the organization could not be established merely by the opinion testimony of a police officer who at one time had been a member.

*Kenmotsu v. Nagle*, 44 F. (2d) 953, 955." See also *Branch v. Cahill*, 88 F. (2d) 545 (1937).

While the decision of the court below seeks to distinguish apparently conflicting decisions on the ground that they were "all fact cases," the foregoing analysis of the state of the authorities in other circuits shows that a genuine conflict exists. The instant decision cannot be reconciled with the cases in which judicial notice has been taken that the Communist Party falls within the proscription of the statute, and it is also out of harmony with the decisions which have held that evidence that the Communist Party of America is dedicated to the historic teachings of Marx and Engels is sufficient to support a deportation order.

In view of the conflict created by the decision below, and the resulting uncertainty regarding the status of aliens in this class of cases and the administrative procedure to be followed by the Department of Labor, it is believed that a decision by this Court will be in the public interest.

#### CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ ROBERT H. JACKSON,  
*Solicitor General.*

GERARD D. REILLY,  
*Solicitor, Department of Labor.*

SEPTEMBER 1938.

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**No. 830**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRA-  
TION AND NATURALIZATION, PETITIONER**

**v.**

**JOSEPH GEORGE STROCKE**

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**REPLY MEMORANDUM FOR THE PETITIONER**

---

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# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 330

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

JOSEPH GEORGE STRECKER

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## REPLY MEMORANDUM FOR THE PETITIONER

In opposing certiorari herein the respondent has relied in part on the fact that the decree of the Circuit Court of Appeals is not final but directs that the case be remanded for trial *de novo* in the District Court. In view of this argument of respondent it seems appropriate to make clear our position that the character of the decree, so far from constituting a reason for denying the petition, furnishes additional ground for granting it.

The original decree of the Circuit Court of Appeals simply reversed the judgment of the District Court and remanded the cause to it (R. 110-113).

The Government's petition for rehearing was denied on June 7, 1938, but without the request of either party the judgment was amended to provide for a trial of the issues *de novo* in the District Court (R. 118). A second petition for rehearing was thereupon filed by the Government urging that a trial *de novo* in the District Court was an improper disposition of the case (R. 121-122). This petition was entertained by the court and denied on July 27, 1938 (R. 124). In the petition for certiorari the action of the Circuit Court of Appeals in ordering a trial *de novo* was specified as an error to be urged (Pet. 5).

In our view the direction for a new trial in the District Court, which is supported, as the court below observed, by *Ex parte Fierstein*, 41 F. (2d) 53 (C. C. A. 9th), is based upon a misapplication of the decisions of this Court holding that in deportation cases the issue of alienage or citizenship is one which may be tried *de novo* in the District Court on habeas corpus. See, e. g., *Ng Fung Ho v. White*, 259 U. S. 276. The peculiar character of the issue of alienage or citizenship, making such a course appropriate with respect to that issue, was pointed out by the Circuit Court of Appeals for the Sixth Circuit in *Exedahtelos v. Fluckey*, 54 F. (2d) 858. In that case the practice in the Ninth Circuit was expressly disapproved; the court reversed a decree of the District Court based upon a trial *de novo* where the evidence before the immi-

gration officers was insufficient to support the order. The court there pointed out that if the court concludes that the order is not supportable two courses are open, absent the issue of alienage or citizenship: an order of absolute discharge or an order of conditional discharge subject to further proceedings being taken by the immigration authorities within a designated time.

Where, as here, the procedural disposition of the case by the Circuit Court of Appeals raises in itself a serious question of practice, there is no reason to apply the general rule that interlocutory judgments will not be reviewed on certiorari. Cf. *Landis v. North American Company*, 299 U. S. 248, 254.

Since in our view the District Court cannot properly be required to try the disputed question *de novo*, and since such a requirement constitutes a departure from principles governing judicial review of administrative action, it is submitted that the present decree of the Circuit Court of Appeals affords a proper and indeed necessary occasion for the granting of certiorari.

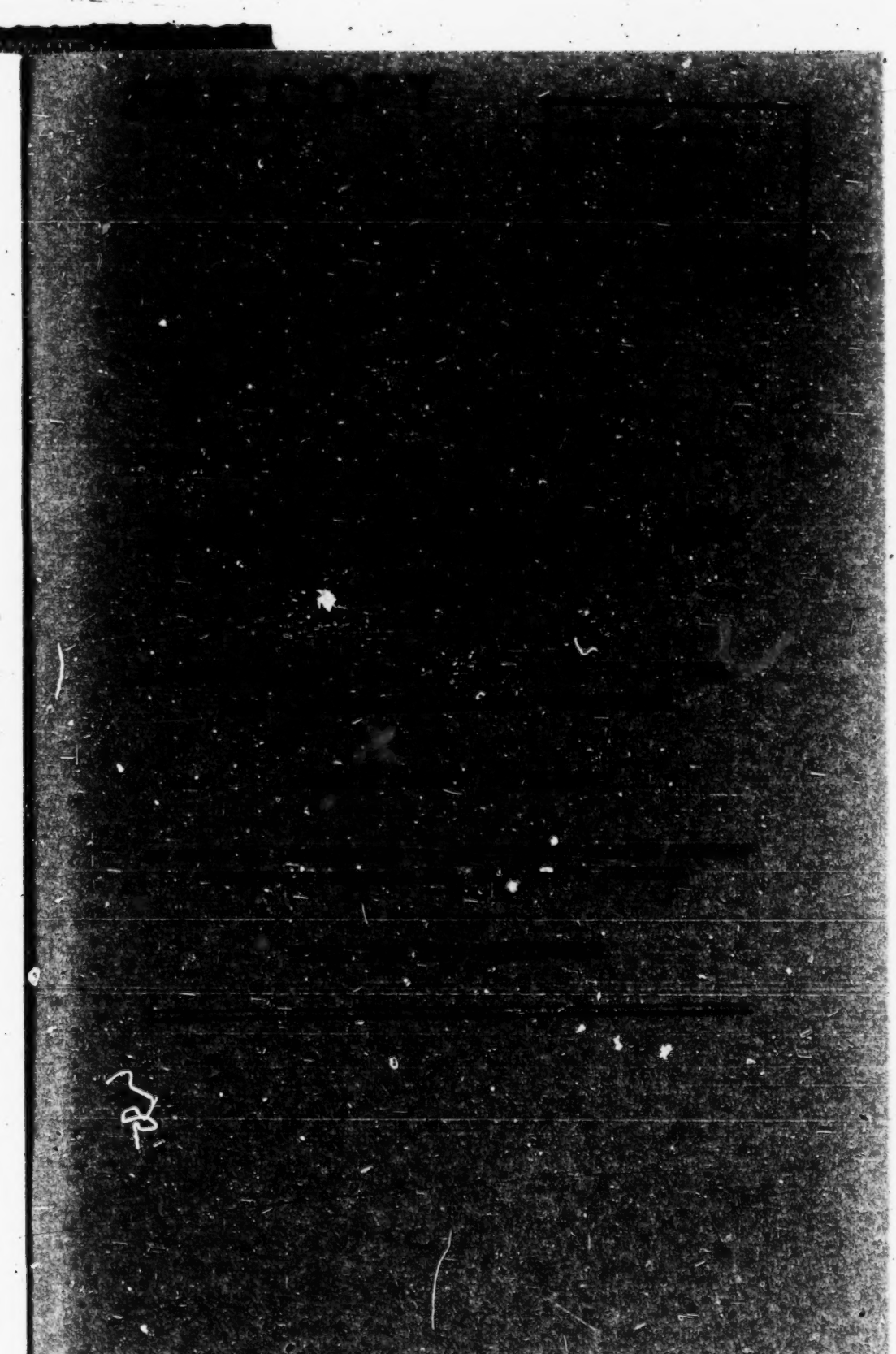
Respectfully submitted.

ROBERT H. JACKSON,  
*Solicitor General.*

GERARD D. REILLY,  
*Solicitor, Department of Labor.*

OCTOBER 1938.









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# In the Supreme Court of the United States

OCTOBER TERM, 1938

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No. 330

EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

JOSEPH GEORGE STRECKER

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered no opinion (R. 65). The opinion of the Circuit Court of Appeals (R. 71-74) is reported in 95 F. (2d) 976. The *per curiam* and dissenting opinions in the Circuit Court of Appeals in connection with the denial of a motion for rehearing by the petitioner herein (R. 77-78) are reported in 96 F. (2d) 1020.

## JURISDICTION

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 74). An

order denying a petition for rehearing (R. 74-76) was entered June 7, 1938 (R. 79), and on the same day an order was entered amending the judgment (R. 79). An order denying a second petition for rehearing and to set aside the judgment as amended, filed June 27, 1938 (R. 80-81), was entered July 27, 1938 (R. 83). The petition for writ of certiorari was filed September 7, 1938, and was granted October 17, 1938 (R. 84). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

The questions presented by the petition for writ of certiorari are as follows:

(1) Whether the Circuit Court of Appeals erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States (Pet. p. 2).

(2) Whether the Circuit Court of Appeals erred in remanding the case for a trial *de novo* in the District Court (Pet. p. 5; Reply Memorandum for Petitioner).

A further question which is not specifically presented by the petition for writ of certiorari but which was decided by the court below and which this Court has the power to consider in order to effect a complete disposition of the case, is the following:

(3) Whether there was any evidence to support the finding contained in the warrant of deportation that respondent "believes in and teaches the overthrow by force and violence of the Government of the United States."

#### STATUTES INVOLVED

Section 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012 (U. S. C., Title 8, Sec. 137 (g)), provides—

That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

Section 1 of the Act of October 16, 1918, *supra*, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008, 1009 (U. S. C., Title 8, Sec. 137 (c)), so far as pertinent, provides—

1. That the following aliens shall be excluded from admission into the United States:

\* \* \* \* \*

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affil-

iated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States \* \* \* ;

\* \* \* \* \*

Section 19 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 890 (U. S. C., Title 8, Sec. 155), provides in part:

\* \* \* In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

Section 20 of the Immigration Act of 1917, c. 29, 874, 39 Stat. 890 (U. S. C., Title 8, Sec. 156), contains provisions with reference to the place of deportation, etc. With the exception of the section last mentioned, these and prior statutory provisions are more fully set out in Appendix A, *infra* pp. 62-79.

#### STATEMENT

From the record of departmental hearings, filed by agreement in the District Court (R. 4-7), the following facts appear. Respondent, an alien, legally entered the United States in 1912. In 1933 he filed a petition for naturalization, but before completing that process deportation proceedings were begun against him (R. 4). On November 25, 1933, the Department of Labor issued a warrant for his arrest (R. 5). This warrant (R. 7-8) con-

tained four charges: (1) that the alien believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; (2) that he is a member of or affiliated with an organization, association, society, or group that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States; (3) that he is a member of or affiliated with an organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, written or printed matter advising, advocating, or teaching the overthrow by force or violence of the Government of the United States; and (4) that he is in the United States in violation of Section 2 of the Act approved October 16, 1918, as amended by the Act approved June 5, 1920, in that after his entry into the United States he has been found to have become a member of one of the classes of aliens enumerated in Section 1 of such act, as amended (*supra*, pp. 3-4), to wit: an alien who is a member of or affiliated with an organization, association, society, or group that believes in, advises, or teaches the overthrow by force and violence of the Government of the United States.

Two hearings were accorded respondent under this warrant of arrest. At each of these hearings



respondent was represented by counsel and was permitted to cross-examine and to present witnesses (R. 5, 8-44, 44-64). Evidence introduced by the Government in support of the warrant at the first hearing, held on January 23, 1934, included (R. 5) membership book No. 2844 of the Communist Party of the United States in the name of the respondent (R. 34-38), a statement made by respondent to an immigration officer on October 25, 1933 (R. 30-34), and a report of a hearing before the Acting District Director of Naturalization, sworn to by respondent on September 16, 1933, on respondent's application for naturalization (R. 38-44). At the first deportation hearing there was also introduced the testimony of the respondent (R. 9-17), of one Florence Levering (R. 17-27) and of a character witness for the respondent (R. 27-29). As the result of the evidence introduced at this hearing (R. 8-44), the Immigration Inspector who conducted the hearing reached the conclusion that the charges contained in the warrant were sustained and recommended deportation (R. 29-30).

The second deportation hearing was held on May 8 [23], 1934 (R. 5, 44). At this hearing the Immigration Inspector who presided stated "that the Bureau of Immigration and Naturalization of Washington has ordered that the case be re-opened for the purpose of introducing into the records of International or other authorities sufficient exhibits

of Literature of the Communist Party to show that the Party advocates to overthrow by force or violence the United States Government or other forms of organized government" (R. 45). What the inspector undoubtedly intended to say was that the case was reopened for the purpose of introducing into evidence exhibits describing the objectives of the Communist International and its affiliate, the Communist Party of the United States. At this hearing the Government read into the record extracts from a magazine entitled "The Communist" dated April 1934, Eighth Convention Issue, "a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 5, 45-48). After the introduction of this evidence the Immigration Inspector inquired whether the respondent had any evidence to rebut the Government's additional evidence (R. 48). In the rebuttal the respondent introduced several character witnesses and gave further testimony in his own behalf, during which, among other things, he denied certain of the statements contained in his earlier testimony before the immigration and naturalization officers, which had been introduced into evidence at the first deportation hearing (R. 48-64).

On the basis of the evidence adduced at the above hearings the Secretary of Labor on August 14, 1934, issued a warrant for the deportation of respondent (R. 5). This warrant (R. 64-65) found that the

respondent was deportable on the following grounds: (1) that he believes in and teaches the overthrow by force and violence of the Government of the United States; (2) that he is a member of an organization, association, society or group that believes in, advises, advocates, and teaches the overthrow by force and violence of the Government of the United States; <sup>1</sup> (3) that he is a member of an organization, association, society, or group that writes, publishes, and circulates written or printed matter advising, advocating, and teaching the overthrow by force and violence of the Government of the United States; <sup>1</sup> and (4) that after entry he became a mem-

---

<sup>1</sup> The Government does not rely upon the second and third grounds specified in the warrant. These allege that the respondent "is" a member of the organizations described (R. 64-65). The Communist Party membership book of the respondent discloses that he joined the Party in November 1932, and that he did not pay membership dues after February 1933 (R. 34, 36). He testified that he bought only "a few stamps" to put in the book (R. 14; see also R. 6). The membership book states that "Members who are four weeks in arrears in payment of dues cease to be members of the party in good standing," and that "Members who are three months in arrears shall be stricken from the rolls" (R. 38). It would, therefore, appear that respondent was stricken from the rolls of the Party some time in May 1933. There was no evidence to the contrary. The warrant of arrest was not issued, however, until November 25, 1933 (R. 8), and the warrant of deportation was dated August 14, 1934 (R. 65). In view of the evidence the Government finds no ground for contending that at those times the respondent was a member of the described organizations. Cf. *Greco v. Haff*, 63 F. (2d) 863 (C. C. A. 9th).

ber of one or more of the classes of aliens enumerated in Section 1 of the Act of October 13, 1918, as amended by the Act of June 5, 1920 (*supra*, pp. 3-4), to wit, aliens who are members of an organization, association, society, or group that believes in, advocates, and teaches the overthrow by force and violence of the Government of the United States.

On June 25, 1936, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas based on the same grounds as the application in the instant case. After hearing the evidence, Judge Martineau, on January 28, 1937, denied the petition but allowed an appeal to the Circuit Court of Appeals for the Eighth Circuit. The appeal was never perfected and was docketed and dismissed in the Circuit Court of Appeals on May 13, 1937 (R. 5).

The petition for writ of habeas corpus in the instant case was filed on June 16, 1937, in the District Court for the Eastern District of Louisiana (R. 5). This petition alleged, among other things, that the warrant of deportation was void because the respondent had not been accorded a fair hearing by the Labor Department and because there was no evidence in the record of the Labor Department to sustain the finding[s] contained in the warrant of deportation (R. 1-2). The writ issued (R. 2) and an answer was filed on behalf of the

petitioner herein (R. 2-4). After hearing all the evidence and the arguments of counsel, Judge Borah, without opinion, denied the application for writ of habeas corpus and remanded the respondent to the custody of the immigration authorities (R. 7, 65).

On appeal (R. 66-69), the Circuit Court of Appeals reversed the order below and remanded the cause for further proceedings not inconsistent with its opinion (R. 74).

The Circuit Court of Appeals rejected the contention of respondent that the deportation hearings had been unfair, but held that there was no evidence to support the findings contained in the warrant of deportation (R. 71-73).

The court declared that the statute under which the proceedings were instituted was enacted in 1918 and amended in 1920 to meet a situation caused by the crisis in Russia in 1918 and 1919 and the propaganda following that crisis for the overthrow of governments by force; that decisions relied upon in that court by the petitioner, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience and the record of the Party at that time; that they were fact cases, and did not and could not decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation.

The court then pointed out that the situation, politically and socially, had changed since 1920;



that Russia itself is more vigorously organized than almost any other country in the world to prohibit and suppress those who teach and preach the overthrow of government by force; that in this country the Communist Party had participated in the presidential elections of 1932 and 1936; that nothing in our Constitution or our laws forbids the formation of such a party or persons from joining it; and that "The statute invoked here does not forbid membership in the Communist, or in any other party, except one which teaches the overthrow by force and violence, of the government of the United States" (R. 73). Judge Holmes concurred in the result (R. 74).

A petition for rehearing was denied on June 7, 1938, but the judgment of reversal was amended to read "Reversed, with directions to try the issues *de novo* as suggested in *Ex Parte Fierstein*, 41 Fed. (2d) p. 54" (R. 77).

Judge Sibley dissented from the denial of rehearing (R. 77-78). He thought rehearing should be granted, especially to consider the significance of the references to the Third Communist International contained in the membership book issued to respondent by the Communist Party of the United States and the question whether the objectives and programs of the two named organizations can be judicially noticed. He said that "Neither of these things was argued before us nor considered in deciding the case, and they might lead to a different result."

Judge Sibley pointed out that the court in its opinion had resorted to judicial notice in its remarks about recent changes in the methods of the Communist Party and in Soviet Russia (R. 78). And he concluded (R. 78):

But no one professes to know that the Communist International had in 1933 changed its program, or indeed that the Communist Party of the U. S. A. at that time had. No one doubts that the economic aims of Communism may be lawfully promoted by a citizen or an alien in the United States, so long as they are sought to be attained by peaceable means. But the advocacy of attainment by force and violence is outlawed, because laying the foundation for treason.

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred—

(1) In holding that an alien who in 1932 became a member of the Communist Party is not by reason of that fact subject to deportation under the Act of October 16, 1918, as amended by the Act of June 5, 1920 (U. S. C., Title 8, Sec. 137).

(2) In holding that the evidence before the Secretary of Labor concerning the principles of the Communist Party was insufficient to sustain the order of deportation.

(3) In remanding the case for a trial *de novo* in the District Court.

(4) In failing to affirm the judgment of the District Court.

## SUMMARY OF ARGUMENT

1. There was evidence before the Secretary of Labor to support the finding in the warrant of deportation that respondent became, after entry, a member of an organization that believes in, advocates, and teaches the overthrow by force and violence of the Government of the United States. Two questions of statutory construction are presented. The first is whether membership subsequent to entry of the alien, but which has terminated, comes within the deportation provisions. The language of the statute and the relevant decisions support the view that an alien who becomes a member of a described organization after entry is subject to deportation whether or not he is a member at the time of arrest or the issuance of the warrant of deportation. The second question concerns the meaning of belief in or advocacy of force and violence: whether to come within the statute the organization must be shown to believe in or advocate the present use of force and violence for the overthrow of the Government, or whether it is enough that the belief or advocacy relates to some future time when the situation is thought to be propitious. This question of construction may be affected by the extent to which the rights of free speech and free assembly are guaranteed to aliens by the Federal Constitution, and the extent to which deportation can be grounded on acts which could not be directly prohibited under the Bill of Rights. These constitu-

tional questions have apparently not been regarded by the courts as of significance in construing the statutory language prescribing grounds for deportation. The language has been held to embrace belief in or advocacy of force and violence whether immediate or ultimate.

On this construction of the statute there was evidence to support the finding of the Secretary, as held in prior cases decided on comparable evidence. The evidence included the membership book of respondent issued by the Communist Party of the United States, which contained pertinent extracts from the Program of the Communist International, adopted by the Party; and, in addition, extracts from an official publication of the Party, which illuminate the meaning of the doctrine of revolution contained in the membership book, were read into the record. The Program of the Communist International, particularly the section on strategy and tactics, reflects belief in and advocacy of force and violence as a means to overthrow the governments of non-Communist countries. The Secretary was not obliged to place upon the language a different or non-literal construction.

2. There was some evidence in the record to support the finding that respondent himself believes in and teaches the overthrow by force and violence of the Government of the United States.

3. The Circuit Court of Appeals erred in remanding the case for a trial *de novo* in the district court. The order of remand was based upon an

erroneous view of decisions in which such a trial was ordered on the issue of alienage or citizenship. There being no such issue in the present case, the only question for the court concerning the facts is whether there was evidence before the Secretary to support the findings in the order of deportation.

### ARGUMENT

#### I

THERE WAS EVIDENCE IN THE RECORD BEFORE THE SECRETARY OF LABOR TO SUPPORT THE FINDING IN THE WARRANT OF DEPORTATION THAT RESPONDENT, AFTER ENTRY, BECAME A MEMBER OF AN ORGANIZATION THAT BELIEVES IN, ADVOCATES AND TEACHES THE OVERTHROW BY FORCE AND VIOLENCE OF THE GOVERNMENT OF THE UNITED STATES

The scope of review of an order of deportation has been defined in numerous decisions of this Court. In *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106, this Court said:

Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. Cf. *Chin Yow v. United States*, 208 U. S. 8; *Kwock Jan Fat v. White*, 253 U. S. 454. But a want of due process is not established by showing merely that the decision is erroneous, *Chin Yow v. United States*, *supra*, 13, or that incompetent evidence was received and considered. See *Tisi v. Tod*, 264 U. S. 131, 133. Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was *some* evidence



from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial. *Tisi v. Tod*, *supra*. [Italics ours.]

See also *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S. 8; *Tang Tun v. Edsell*, 223 U. S. 673.

As the respondent's contention in the Circuit Court of Appeals that the deportation hearings were unfair was summarily rejected by that court (R. 71), and as the contention was not made in the respondent's brief in opposition in this Court, that question is presumably not presented for consideration here. Cf. *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182. There remains, however, the principal question whether there was any evidence to support the finding of the Secretary of Labor contained in the warrant of deportation that, after entry, respondent became a member of an organization that believes in, advocates, and teaches the overthrow by force and violence of the Government of the United States.

#### A. THE STATUTE

The finding just described, in the order of deportation, was made pursuant to that portion of Section 2 of the Act of October 16, 1918 (*supra*, p. 3), which provides "That any alien who, at

any time after entering the United States, is found to have been at the time of entry, or to *have become thereafter*, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported" [italics ours], and upon that portion of Section 1 of the Act of October 16, 1918, as amended by the Act of June 5, 1920 (*supra*, pp. 3-4), which enumerates among the classes of aliens therein referred to "Aliens \* \* \* who are members of \* \* \* any organization \* \* \* that believes in, advises, advocates, or teaches \* \* \* the overthrow by force or violence of the Government of the United States."

The first question of statutory construction is whether membership after entry, but which has terminated, is ground for deportation. There would seem to be no doubt that the statutory language covers any alien who, after entry, became a member of a proscribed organization even though he was not so at the time of arrest or at the time the warrant of deportation was issued. In *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707, 708 (C. C. A., 2d), certiorari denied, 287 U. S. 607, it was said:

It is true that he was not a member of the Communist Party when arrested. He had recently been expelled because of his attitude toward negroes, but that did not remove him from the reach of the statute. We have

nothing to do with shaping the policy of the law toward aliens who come here and join a proscribed society. Congress has provided that "any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section" shall be deported. 8 U. S. C. A. § 137 (g). This alien concededly did become after entry a member of "one of the classes \* \* \* enumerated" and from that time became deportable. We are urged to ameliorate the supposed harshness of the statute by reading into it words that Congress saw fit to leave out and interpret it to apply not to aliens who become members, but only to those who become and continue to the time of their arrest to be members, of one of the enumerated classes. If the words used in the statute were equivocal or the intention of Congress for any reason uncertain, there might be room for such a construction as that for which the appellant now contends. Perhaps the sufficient answer is that had Congress intended membership at the time of arrest to be the criterion it would have said so. It has the power to determine what acts of an alien shall terminate his right to remain here. *Skeffington v. Katzeff et al.* (C. C. A.) 277 F. 129. What it did do was to make the act of becoming a member a deportable offense without regard to continuance of membership and it did that in

language so plain that any attempt to read in any other meaning is no less than an attempt to circumvent the law itself.

The same question was presented to this Court in the case of *United States ex rel. Mannisto v. Reimer*, in which this Court denied a writ of certiorari (296 U. S. 600) to review a decision of the Circuit Court of Appeals for the Second Circuit (77 F. (2d) 1021).

Congress has apparently approved this construction of the statute, which represents the long-continued administrative practice of the Department of Labor, as Congress recently passed a private Act cancelling a warrant of deportation directed at two aliens who joined the Communist Party inadvertently and then withdrew from membership, the attention of Congress being drawn to the fact that under the language of the 1918 Act the aliens were, nevertheless, mandatorily deportable. (See An Act For the Relief of Angelo and Auro Cattanea approved July 5, 1937, 50 Stat. (Pt. 2) 1013, and Senate Report No. 769, 75th Cong., 1st Session, Committee on Immigration, accompanying H. R. 1731).

The second question of statutory construction concerns the meaning of belief in, or advocacy of, the overthrow of the Government by force or violence—whether the belief or advocacy must relate to some present use of force or may relate to its use at any time in the indefinite future.

While respondent did not specifically raise in his petition for habeas corpus (R. 1-2), or in his assignment of errors below (R. 67-69), or in his brief in opposition to certiorari, the question of the constitutional right of freedom of speech and of assembly under the First Amendment of the Federal Constitution, that question may be deemed by the Court to be pertinent with respect to this question of statutory construction. Cf. *Herndon v. Lowry*, 301 U. S. 242. The rule of construction may be invoked under which a statutory provision must be given, if possible, a construction which will avoid serious constitutional doubt. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 492. The constitutional power to limit freedom of speech and of assembly in the interests of safeguarding the state was thus defined in the *Herndon* case, *supra* (p. 258):

The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.

It was pointed out in that case that "peaceful agitation for a change of our form of government



is within the guaranteed liberty of speech" (p. 259). In that case this Court set aside, on constitutional grounds, a conviction under a criminal insurrection statute of Georgia which made it an offense to advocate violence against the state whether the violence was intended to result immediately or "at any time within which he [the defendant] might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (pp. 254-255). The opinion in that case reserved the question whether the state might specifically have "made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future" (p. 260).

In the present case, unlike the *Herndon* case, the question relates to the power of Congress over resident aliens and the rights of such aliens under the Constitution. It is, of course, settled that Congress may order the deportation of classes of aliens and may commit the execution of such laws to administrative officials, subject to the procedural safeguards guaranteed by the due process clause of the Fifth Amendment and by the other provisions of the Bill of Rights. In *Wong Wing v. United States*, 163 U. S. 228, 238, it was said:

Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a

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capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

And in *The Japanese Immigrant Case*, 189 U. S. 86, 100, it was said:

But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.

Similarly, the protection of the due process and equal protection clauses of the Fourteenth Amendment has been held to extend to aliens. E. g., *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Truax v. Raich*, 239 U. S. 33, 39. And the property rights of aliens who are not subjects of enemy states have likewise been held to be protected by the Constitution. In *Russian Volunteer Fleet v. United States*, 282 U. S. 481, this Court determined that a Russian corporation was entitled to recover from the United States just compensation for the requisitioning of its contracts for use by the United States during the war.

It would appear to be settled, therefore, that with respect to aliens while resident here, the power of Congress is subject to the limitations of the Constitution, and that an appropriate basis must be found for subordinating the rights of persons

under the First Amendment to the exercise of Congressional control. That justification is ordinarily to be sought in the protection of the Government against the danger of overthrow by force and violence. The *Herndon* case, *supra*, suggests that the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted.

The question whether a similar standard is applicable in relation to *deportation* is one which has not been squarely passed upon by this Court. The power to prescribe the terms and conditions upon which aliens may enter and may remain within the country is clearly conferred upon Congress. *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 425; *Ng Fung Ho v. White*, 259 U. S. 276, 280. The assumption that this authority includes the power to deport aliens even for acts the direct proscription of which might infringe the Bill of Rights involves practical as well as logical difficulties. The assumption has been made, however, by the courts, and the construction of the deportation provisions has apparently been unaffected by consideration of the extent to which freedom of speech and of assembly of resident aliens might be directly abridged under the Constitution. *Ex parte Pettine*, 259 Fed. 733, 735 (Mass.); *Lopez v. Howe*, 259 Fed. 401 (C. C. A. 2d); *United States ex rel. Fortmueller v. Commissioner of Immigration*, 14 Fed. Supp. 485, 487 (S. D. N. Y.); cf.

*Colyer v. Skeffington*, 265 Fed. 17, 22-23, 60 (Mass.), reversed, 277 Fed. 129 (C. C. A. 1st).<sup>2</sup>

As a matter of statutory construction, the range of the provisions in question has not been thought by the courts to be limited to those organizations that believe in, teach, or advocate the immediate overthrow of the Government of the United States; it has been deemed to include as well those organizations that believe in or seek the achievement of such an objective at a time when the

<sup>2</sup> The question whether the power to *exclude* aliens before entry furnishes a basis for admitting them on condition that they will refrain to some extent from the exercise of the right of free speech or free assembly is an issue that appears not to be raised by the facts of the present case. Respondent entered the country in 1912 (R. 4). At that time the pertinent provisions of the immigration law were Sections 2 and 38 of the Act of February 20, 1907, c. 1134, 34 Stat. 898, 899, 908-909 (Appendix, *infra*, pp. 64-65, 66). Section 2 provided for the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, \* \* \*". Section 38 provided for the exclusion of any alien "who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character." There was no provision for deportation in the event that an alien became a member of such an organization subsequent to entry. A provision of the latter kind appeared for the first time in the Act of October 16, 1918, c. 186, Sec. 2, 40 Stat. 1012. See Appendix A, *infra*, p. 77.



occasion seems propitious. Not only do the provisions contain no restrictive language with reference to the imminence of the overthrowing of this Government, but the provisions would have scant applicability if confined in operation to organizations that believe in, teach, or advocate the immediate overturning of this Government. Moreover, the fact that there are comparable provisions with reference to the beliefs, teachings, and advocacy of individual aliens (*supra*, pp. 3-4) also suggests that Congress was not concerned with the time element in speaking of the overthrow of this Government by force and violence. The theory of the statute appears to be that aliens who believe in the destruction of our form of government through force or violence or who belong to an organization entertaining or teaching such a doctrine are no less objectionable if they envisage the accomplishment of their objective at an opportune future time than if they advocate it as an immediate endeavor.

The question whether the advocacy or belief contemplated by the statute must relate to immediate overthrow has been considered by several courts, and heretofore a negative answer has been given. In *United States ex rel. Georgian v. Uhl*, 271 Fed. 676 (C. C. A. 2d), the court said, per Hough, J. (p. 677):

We express no opinion as to the result upon our minds of the evidence adduced at the deportation hearing, beyond this, viz.

there was evidence, indeed it was admitted, that though he did not and does not believe in the immediate overthrow of the government of the United States that position is not the result of any affection for the same or approval of this republic, nor of any objection to force and violence per se, but only results from an opinion that the time is not ripe. Ripeness is to be attained by teaching, and by the dissemination of the style of literature which it is his business to circulate; when the time is ripe, it is to be hoped that force and violence will not be necessary, but they will be appropriate as soon as they are likely to prevail.

However fantastic the above-outlined social program may seem, it is impossible to say that a professed and avowed effort to hasten its consummation is not evidence of that which the statute forbids.

In *United States ex rel. Abern v. Wallis*, 263 Fed. 413, 416 (S. D. N. Y.), the court (Knox, J.) said:

It may, of course, be suggested that some regard should be had for the imminence of such a possibility, and I am free to say that from the party's organization, as appears in the record, such possibility is not of the immediate future. The act of Congress, however, under which this proceeding was instituted, provides for the deportation of aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force

and violence of the government of the United States. It will thus be observed that the question here is not one of degrees of imminence of overthrow by force and violence, but rather whether that is the ultimate purpose of the organization.

See also *Kjar v. Doak*, 61 F. (2d) 566, 568 (C. C. A. 7th).

Support for such a construction is also contained in the decision of this Court in *Turner v. Williams*, 194 U. S. 279. In that case there was involved the constitutionality of a provision contained in the Immigration Act of 1903 for the deportation of aliens who, at the time of entry, were "anarchists." The argument was made that "conceding that Congress has the power to shut out any alien, the power nevertheless does not extend to some aliens, and that if the act includes all alien anarchists, it is unconstitutional, because some anarchists are merely political philosophers, whose teachings are beneficial rather than otherwise" p. 292). After pointing out through a dictionary definition that the term "anarchist" is used in the popular sense as "one who seeks to overturn by violence all constituted forms and institutions of society and government, all law and order, and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed" the Court said (p. 293):

—The language of the act is "anarchists, or persons who believe in or advocate the over-

*throw by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials."* If this should be construed as defining the word "anarchists" by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And we suppose counsel does not deny that this Government has the power to exclude an alien who believes in or advocates the overthrow of the Government or of all governments by force or the assassination of officials. To put that question is to answer it. [Italics ours.]

The Court then reviewed the evidence with reference to the alien involved and came to the conclusion (p. 294) that "we cannot say that the inference was unjustifiable either that he contemplated the *ultimate realization* of his ideal by the use of force, or that his speeches were incitements to that end." [Italics ours.]

It would also seem significant, as indicating the broad construction which this Court thought might properly be given the statute, that it further said (p. 294):

If the word "anarchists" should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that Congress was of opinion that the

tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government.

See also *Lopez v. Howe*, 259 Fed. 401, 404-405 (C. C. A. 2d), *supra*; *Ex parte Pettine*, 259 Fed. 733, 735 (Mass.), *supra*.

That a like meaning was meant to be given the provisions in question is suggested by the reenactment of the provisions involved in *Turner v. Williams*, 194 U. S. 279, in the Immigration Act of February 20, 1907, c. 1134, Sec. 2, 34 Stat. 898, 899, and (with a minor change) in the Immigration Act of February 5, 1917, c. 29, Sec. 3, 39 Stat. 874, 875-876. See Appendix A, *infra*, pp. 64-65, 67. Although Congress in the Immigration Act of October 16, 1918, c. 186, Sec. 1, 40 Stat. 1012, Appendix A, *infra*, pp. 76-77, placed alien "anarchists" in a separate class from those aliens "who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law," and placed also in another class those aliens "who advocate or teach the assassination of public officials," and while a similar grouping was made in the amendatory Act



of June 5, 1920, c. 251, 41 Stat. 1008, 1009, Appendix A, *infra*, p. 78, there is nothing in the legislative history indicating that these amendments were meant to disturb the construction given by this Court in the *Turner case* to the language "the overthrow by force or violence of the Government of the United States" or to confine the construction to those classes of aliens comprehended within the term "anarchists." While the provisions interpreted in the *Turner case* and the comparable provisions in later legislation, to which reference has been made, relate only to the beliefs, teachings, and advocacy of individual aliens, there would appear to be no reason to suppose that Congress meant to give a different interpretation to the similar language which it employed with reference to organizations. It is well settled that reenactment of language which has been judicially construed constitutes a legislative adoption of such construction. *Johnson v. Manhattan Ry Co.*, 289 U. S. 479, 500; *Heald v. District of Columbia*, 254 U. S. 20, 23. Cf. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 557; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493.

There is nothing in the legislative history of the phrase "the overthrow by force or violence of the Government of the United States" as used either in the 1920<sup>3</sup> or 1918<sup>4</sup> Acts or in the prior statutes of

<sup>3</sup> S. Rept. No. 648, 66th Cong., 2nd Sess.; H. Rept. No. 504, 66th Cong., 2nd Sess.

<sup>4</sup> H. Rept. No. 645, 65th Cong., 2nd Sess.

1917,<sup>\*</sup> 1907,<sup>\*</sup> and 1903,<sup>†</sup> which indicates that Congress intended the phrase to be given such a narrow construction as would include only those aliens or organizations that believe in, teach, or advocate the immediate overthrow of this Government. Congressman Shattuc, the Chairman of the House Committee on Immigration and Naturalization, in presenting to the House the bill which became the 1903 Act, and in pointing to some of the evils which it sought to meet, indicated a purpose in the bill as a whole broader than the protection of our Government against a danger of present overthrow:

\* \* \* it has developed, new elements have been purposely injected into the stream [of immigrants] which, unless checked, threaten not only to seriously pollute it, but also to thrust upon our nation and the States burdens they should not be called upon to bear.

By reason of this change the feeling of welcome which had hailed the incoming immigrant from 1821 to 1875 changed to one of alarm lest "the unguarded gate" might

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<sup>\*</sup> S. Rept. No. 352, 64th Cong., 1st Sess. See also S. Rept. No. 355, 63d Cong., 2nd Sess.; H. Rept. No. 140, 63d Cong., 2nd Sess.; H. Rept. No. 149, 63d Cong., 2nd Sess.; H. Rept. No. 1270, 63d Cong., 3rd Sess.; H. Rept. No. 1368, 63d Cong., 3rd Sess.; H. Rept. No. 851, 62nd Cong., 2nd Sess.; H. Rept. No. 1340, 62nd Cong., 3rd Sess.; H. Rept. No. 1378, 62nd Cong., 3rd Sess.; H. Rept. No. 1410, 62nd Cong., 3rd Sess.

<sup>\*</sup> H. Rept. No. 7607, 59th Cong., 2nd Sess. See also S. Rept. No. 187, 61st Cong., 2nd Sess.

<sup>†</sup> S. Rept. No. 2119, 57th Cong., 1st Sess.; H. Rept. No. 982, 57th Cong., 1st Sess.

allow entrance too freely to elements discordant and not easily assimilated, as well as burdensome and harmful to the best interests of the country.

Hence there has arisen the demand, growing more and more insistent, that restrictive measures should be enacted to regulate the influx and sift the quality of the incoming aliens. \* \* \* (35 Cong. Record, 5757.)<sup>\*</sup>

While the construction of the provisions in question was not specifically involved in *Vajtauer v. Commissioner of Immigration*, *supra*, this Court there held that certain evidence constituted at least some evidence to show that the alien "advised and advocated opposition to all organized government and the overthrow of the United States government by violence" (273 U. S. 110). There is nothing in the evidence referred to in that case (see footnotes 3 and 4 of the opinion, pp. 107-109) which indicates the advocacy of an immediate overthrow

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<sup>\*</sup> The Report of the House Committee on Immigration and Naturalization, accompanying this bill, with respect to the instant provision, stated: "The second class [the class herein involved] was introduced to enable this country to deal effectively with an evil of a most insidious character, by rejecting those aliens whose purpose in seeking the protection and freedom furnished by American institutions is to propagate the doctrine of forcible resistance, by bloodshedding if necessary, to organized law and order, upon the theory that an effective treatment of the evil can be best secured by refusing admission to the teachers and disciples of a system not indigenous to the soil of this country" (House Report No. 982, 57th Cong., 1st Sess., p. 3).

of this Government. Indeed, the evidence referred to in footnote 4 of the opinion (p. 109) clearly indicates that the alien had in mind the future destruction of the Government.

It should also be pointed out that there is nothing in the decision of the Circuit Court of Appeals which suggests that that court was of the view that the provisions involved should be limited to a belief in or advocacy of the immediate destruction of this Government.

#### B. THE RECORD

If the provisions in question are properly interpreted as referring to any alien who, after entry, becomes a member of an organization that believes in, advises, teaches, or advocates the overthrow by force or violence of this Government either immediately or ultimately, it cannot be said that the record before the Secretary of Labor was wanting in evidence to support a finding that the respondent came within the class described.

Respondent admitted that he joined the Communist Party of the United States in November 1932 (R. 11, 42). His membership book, which was issued on January 3, 1933, and refers to the alien as having entered the "Revolutionary Movement," discloses that he was admitted as a member on the preceding November 15 (R. 11-12, 34). No dues stamps were affixed to the membership book for any period subsequent to February 1933 (R. 36).

The qualifications for, and obligations of, membership in the Communist Party of America and the relation of that Party to the Communist International are set forth in the statutes of the Communist Party of the United States, as found in the membership book which was introduced at the first deportation hearing (R. 11, 35-38):

### §3. MEMBERSHIP

1. A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

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### §4. THE STRUCTURE OF THE PARTY

1. The Communist Party, like all sections of the Comintern, is built upon the principle of democratic centralization. These principles are: \* \* \*

\* \* \* \*

(c) Acceptances and carrying out of the decisions of the higher Party committees by the lower Strict Party discipline, and immediate and exact applications of the decisions of the Executive Committee of the Com-



munist International and of the Central Committee of the Party.

(e) The discussion on basic Party questions or general Party lines can be carried on by the members only until the Central Committee has decided them. After a decision has been adopted at the congress of the Comintern, the Party convention, or by the leading Party committee, it must be carried out unconditionally, even if some of the members or some of the local organization are not in agreement with the decision.

#### § 12. PARTY DISCIPLINE

1. The strictest Party discipline is the most solemn duty of all Party members and all party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made.

#### ON DISCIPLINE

He who weakens, no matter how little, the iron discipline of the Party of the proletariat (especially during the period of dictatorship) effectually helps the bourgeoisie against the proletariat (Lenin).

The Party as the best training school for working class leaders, is the only organiza-

tion competent, in virtue of its experience and authority to centralize the leadership of the proletarian struggle and thus to transform all non-Party working class organizations into accessory organs and connecting belts linking up the Party with the working class as a whole (Lenin).

The foregoing extracts indicate adoption of and subservience to the Program and statutes of the Communist International by the Communist Party of the United States. The objectives and methods thus adopted as binding upon the Party are likewise described in the membership book (R. 38):

#### WHAT IS THE COMMUNIST PARTY?

The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will, and of *proletarian revolutionary action*. (From the program of the Communist International.)

We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest con-

tacts with our Party (Lenin). [Italics ours.]

The first paragraph of the above is taken, as the record shows, from the Program of the Communist International. Whether such phrases as "proletarian revolutionary action" and "revolutionary theory of Marxism" would be too equivocal in themselves to support the conclusion that the Communist Party believes in the overthrow of the Government by force and violence is a question that it seems unnecessary to consider,\* for the record contains additional evidence bearing on their meaning. At the second of the deportation hearings, passages were read into the record from a journal dated April 1934, entitled "The Communist, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 45). The following passage contains an interpretation of the "revolutionary theory of Marxism" which expressly repudiates the notion that it is compatible with peaceful and orderly change (R. 47-48):

In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the

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\* In *Herndon v. Lowry*, 301 U. S. 242, 249-250, this Court characterized the same passage as "innocent upon its face however foolish and pernicious the aims it suggests," and as being a "vague declaration" and a "statement of ultimate ideals." This characterization was made, of course, from the standpoint of the criminal insurrection statute of Georgia.

mass political strike and for an armed insurrection of the fight for power, means to disarm the workers in the face of the attack of the bourgeoisie,

DeLeon's conception of the proletarian revolution was the same, as far as the deception for the American proletariat goes, as that of the reformists of the Second International, in spite of his revolutionary phrases. Lenin, in his *State and Revolution*, makes a classical formulation about Kautsky's position on this point, which can fittingly apply to DeLeon, Lenin states:

"The necessity of systematically fostering among the masses this and just this point of view about *violent revolution* lies at the root of the whole Marx' and Engles' teachings. The neglect of such propaganda and agitation by both the present predominant social-chauvinists and Kautskyist currents being their betrayal \* \* \* into prominent relief" (p. 20, International Ed.).<sup>10</sup>

The question of a *violent revolution* lies at the root of Marx's teachings. *Only philistines or downright opportunists can talk about revolution without violence.* [Italics ours.]

The following is quoted from the Program of the Communist International (R. 47):

The Party must neither stand aloof from the daily needs and struggles of the working

<sup>10</sup> It may be added that immediately following this passage Lenin wrote: "The replacement of the bourgeois by the proletarian state is impossible without a violent revolution."

class nor confine its activities exclusively to them. The task of the Party is to utilize these minor everyday needs as a starting point from which to lead the working class to the *revolutionary struggle for power* (C. I. Program). [*Italics ours.*]

There is nothing in the record to indicate that this country was meant to be excepted from the Program. On the contrary, the passages read into the record, taken with the exposition in the membership book of the strict adoption of that Program by the Party in this country, furnish a basis for concluding that force and violence were believed in and advocated as a method of obtaining power in any so-called capitalistic or imperialistic country, including, as it is declared, the United States. The following passages are relevant in this regard:

It is more than likely th in the course of the development of the world revolution, there will come into existence—*side by side with the foci of imperialism in the various capitalist lands and with the system of these lands throughout the world*—foci of socialism in various Soviet countries, and a system of foci throughout the world. As the outcome of this development, there will ensue *a struggle between the rival systems*, and its history will be the history of the *world revolution*. The world-wide significance of the October revolution lies not only in the fact that it was the first step taken by any country whatsoever to shatter imperialism, that it brought into being the first little island of



socialism in the ocean of imperialism, but likewise in the fact that *the October revolution is the first stage in the world revolution and has set up a powerful base whence the world revolution can continue to develop*" (Stalin, "The October Revolution and the Tactics of the Bolsheviks," Leninism, International Publishers, Vol. 1, pp. 215, 216). [Italics ours.] (R. 46-47.)

Every party that desires to belong to the Communist International must give every possible support to the Soviet republics in their struggle against all counter-revolutionary forces. The Communist parties should carry on precise and definite propaganda to induce the workers to refuse to transport munitions of war intended for enemies of the Soviet Republics, *carry on legal, or illegal propaganda among the troops which are sent to crush the workers' republics, etc.*<sup>11</sup>

To fulfill this duty, the Communist Parties must carry to the broadest masses the words of the call of the Central Executive Committee of the Chinese Soviet Republic, which are directed to the toilers of the entire world. They must conduct not only agita-

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<sup>11</sup> This paragraph is taken from the fourteenth condition of admission into the Communist International, as stated in *The Communist*, April 1934, p. 392 (from which the passage was read). There were 21 such conditions formulated and adopted by the Second World Congress of the Communist International in 1920, and these were in force while respondent was a member of the Communist Party of the United States. See Appendix C, *infra*, pp. 93-100.

*tion, but they must also organize actions directed against the transportation of weapons and munitions to China, against the intervention of American, European, and Asiatic imperialists. (R. 46.) [Italics ours.]*

These excerpts from the official organ of the Communist Party of the United States furnish a basis for concluding that it is a party which seeks the overthrow through violent revolutionary action, when the occasion seems propitious, of the governments of so-called capitalistic-imperialistic countries, of which America is regarded as one.

Respondent was asked by the Immigration Inspector after the introduction of these excerpts whether he had "any documents to present or evidence to offer at this time in rebuttal of this evidence that your membership in the Communist Party constitutes membership in an organization which believes in or teaches the overthrow by force or violence the government of the United States or all forms of organized government?" (R. 48). Respondent introduced no evidence tending to explain or refute the foregoing evidence, but presented only testimony by his acquaintances as to his personal character and as to whether they had heard him advocate Communism and by himself as to his beliefs. He also denied that he made certain statements appearing in the testimony which he gave before the immigration and naturalization officers prior to the deportation hearings (R. 48-64). Respondent did not question that the excerpts from

the magazine, although it was published about a year after his membership in the Party terminated, represented the beliefs and teachings of the Party at the time he was a member thereof. (Cf. *Kjar v. Doak*, 61 F. (2d) 566, 569 (C. C. A. 7th).

Respondent's own understanding of the objectives and methods of the Party apparently corresponded with that contained in the above commentaries. At a preliminary examination by an Immigration Inspector respondent testified (R. 32-33), which testimony was introduced at the first deportation hearing (R. 10), that at the time of his initiation into the Communist Party he was familiar with its intents and purposes; that he acquired prior knowledge of Communism from a study of the writings of Marx over a period of about ten years; that he was in accord with Marx in regard to the social order of things; that the Communist Party of America proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that the leaders of communism say that it will resort to armed force in the event that it should be necessary; that he would not personally bear arms against the present United States Government "because Communism is not strong enough now."

Respondent did not contend in the courts below that the extracts from the Program of the Communist International and the commentaries thereon should be supplemented by other portions of the

Program. It may be pointed out, however, that the extract contained in the membership book and quoted above (*supra*, p. 36) is to be found in Chapter VI, the final chapter, of the Program, entitled "The Strategy and Tactics of the Communist International in the Struggle for the Dictatorship of the Proletariat," in Section 2 thereof, the final section entitled "The Fundamental Tasks of Communist Strategy and Tactics." See Appendix, *infra*, p. 80. The entire Program, which was adopted on September 1, 1928, at the Sixth World Congress of the Communist International held at Moscow, is a document of about twenty thousand words and has been published in an official English text by Workers Library Publishers, Inc.<sup>12</sup> The section on Strategy and Tactics, from which the quoted excerpt was taken, contains a program of action for various stages in the revolutionary movement: the stage when "a revolutionary situation is developing," "when the revolutionary tide is rising" and "when the revolutionary tide is not rising" (*infra*, pp. 85-86). It is when the revolutionary tide is

<sup>12</sup> Analysis and discussion of the program may be found in the following works, *inter alia*: *Foreign Affairs*, January 1929, pp. 259-269; Florinsky, *World Revolution and the U. S. S. R.* (1933), pp. 177-193; *Bolshevism, Fascism, and Capitalism* (Institute of Politics, Williams College, 1932); *New Governments in Europe, A Trend Towards Dictatorship* (Foreign Policy Association, 1934, Revised Edition 1937); Sidney and Beatrice Webb, *Soviet Communism—A New Civilization* (1936).

rising that the occasion is believed to be appropriate for the use of force and violence, as the following passage indicates (*infra*, pp. 85-86):

When the revolutionary tide is rising, when the ruling classes are disorganized, the masses are in a state of revolutionary ferment, the intermediary strata are inclining towards the proletariat, and the masses are ready for action and for sacrifice, the Party of the proletariat is confronted with the task of leading the masses to a direct attack upon the bourgeois State. This it does by carrying on propaganda in favor of increasingly radical transitional slogans (for Soviets, workers' control of industry, for peasant committees for the seizure of the big landed properties, for disarming the bourgeoisie and arming the proletariat, etc.), and by organizing *mass action*, upon which all branches of the Party agitation and propaganda, including parliamentary activity, must be concentrated. This mass action includes: a combination of strikes and demonstrations; a combination of strikes and armed demonstrations and, finally, the general strike conjointly with armed insurrection against the State power of the bourgeoisie. The latter form of struggle, which is the supreme form, must be conducted according to the rules of war; it presupposes a plan of campaign, offensive fighting operations and unbounded devotion and heroism



on the part of the proletariat. An absolutely essential condition precedent for this form of action is the organization of the broad masses into militant units, which, by their very form, embrace and set into action the largest possible numbers of toilers (Councils of Workers' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the army and the navy.

At an earlier point in the program (ch. IV, The Period of Transition from Capitalism to Socialism and the Dictatorship of the Proletariat) the transformation of social and economic relations by parliamentary means is repudiated as impractical.<sup>18</sup>

The conquest of power by the proletariat does not mean peacefully "capturing" the ready-made bourgeois State machinery by means of a parliamentary majority. The bourgeoisie resorts to every means of violence and terror to safeguard and strengthen its predatory property and its political domination. Like the feudal nobility of the past, the bourgeoisie cannot abandon its historical position to the new class without a desperate and frantic struggle. Hence, the violence of the bourgeoisie can be suppressed only by the stern violence of the proletariat. The conquest of power by the proletariat is the vio-

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<sup>18</sup> From "Program of Communist International," published by Workers Publishing Co., Inc. (N. Y., 2d ed. 1933), pp. 36-37.

lent overthrow of bourgeois power, the destruction of the capitalist State apparatus (bourgeois armies, police, bureaucratic hierarchy, the judiciary, parliaments, etc.), and substituting in its place new organs of proletarian power, to serve primarily as instruments for the suppression of the exploiters.

It cannot be gainsaid, of course, that much of the language used is susceptible of an interpretation more rhetorical than literal. See Anderson, J., in *Colyer v. Skeffington*, 265 Fed. 17, 59 (Mass.), reversed, 277 Fed. 129 (C. C. A. 1st).<sup>14</sup>

<sup>14</sup> Compare also the view taken of the philosophy of the Communist Party in Australia by Evatt, J., *obiter*, in *The King v. Hush, Ex parte Devanny* (1932), 48 C. L. R. 487, 516-518:

"There is much in the matters averred and printed to suggest that the Communist Party advocates that the whole Parliamentary machine must be completely changed—transformed—revolutionized, in order that a monopoly of political power shall be given to the working class, and that owners of private industries, property and wealth shall be dispossessed without compensation; further, that it is highly probable that so great a change, whether or not it is approved by the majority or ordained by law, will not be acquiesced in without resort to force on the part of those dispossessed, that, in this sense, a violent civil upheaval will, almost certainly, accompany the proposed transformation of society and that actual civil violence and disturbance will accompany the attempted socialization of industry.

\* \* \* \* \*

The doctrine of the class struggle raises a dispute as to fact, rather than opinion. It is not a question whether it is

But since the Party saw fit to use words of general application which in their popular and ordinary sense fairly import that the Party believes in and advocates the overthrow of this Government other than by orderly or lawful means when an ap-

desirable to have a struggle between a property-less class and a property-owning class, but whether such struggle exists in fact. The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship, there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that a violent upheaval will ensue when the time comes to effect such substitution (*Encyclopaedia Britannica*, 12th ed., vol. 30, p. 732 (*R. P. Dutt*); cf. *Laski's Democracy in Crisis*, pp. 194, 226, 227, 241).

"When the time comes." It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. "The inevitability of gradualness" as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and the threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability."

appropriate opportunity is created, there is no occasion for a court to refine and construe the language so as to reach a different conclusion. *United States ex rel. Abern v. Wallis*, 268 Fed. 413, 413-414 (S. D. N. Y.), *supra*; *Antolish v. Paul*, 283 Fed. 957, 959 (C. C. A. 7th); *Kenmotsu v. Nagle*, 44 F. (2d) 953, 955 (C. C. A. 9th). When the evidence before the Secretary is considered as a whole, whether or not supplemented by these additional portions of the Program, we do not think it can fairly be said that within the test laid down by this Court in the *Vajtauer* case (*supra*, pp. 15-16) there was not evidence to support the finding in the deportation warrant that respondent after entry became a member of an organization that believes in, advocates, and teaches the overthrow by force and violence of the Government of the United States.

Comparable evidence has been held in numerous cases to support a finding by the Secretary that the Communist Party of the United States falls within the ambit of the statute. *Skeffington v. Katzeff*, 277 Fed. 129, 132-133 (C. C. A. 1st), reversing *Colyer v. Skeffington*, 265 Fed. 17 (Mass.); *Antolish v. Paul*, 283 Fed. 957, 958-960 (C. C. A. 7th); *Kenmotsu v. Nagle*, 44 F. (2d) 953 (C. C. A. 9th), *supra*; *Kjar v. Doak*, 61 F. (2d) 566, 568-569 (C. C. A. 7th); *Branch v. Cahill*, 88 F. (2d) 545, 546 (C. C. A. 9th); *In re Saderquist*, 11 F. Supp. 525, 526-527 (Me.), affirmed *sub nom. Sorquist v. Ward*, 83 F. (2d) 890 (C. C. A. 1st); *United States ex rel.*

*Abern v. Wallis*, 268 Fed. 413 (S. D. N. Y.), *supra*; see also *Ex parte Vilarino*, 50 F. (2d) 582, 586 (C. C. A. 9th); *Murdoch v. Clark*, 53 F. (2d) 155, 156-157 (C. C. A. 1st); *Wolch v. Weedin*, 58 F. (2d) 928, 930 (C. C. A. 9th).<sup>15</sup> Cf. also *Rez v. Buck* (1932) 3 D. L. R. 97 (Ont. Ct. App.); *Re Worozcyt et al.*, 58 Can. Cr. Cas. 161 (Sup. Ct. Nova Scotia).

It was because of this conflict that review by this Court was sought in the present case.

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<sup>15</sup> Some cases apparently go to the extent of holding that even in the absence of evidence as to the aims and objectives of the Communist Party of the United States, proof of membership in that Party is alone sufficient to support deportation. (Cf. *Ungar v. Seaman*, 4 F. (2d) 80, 81 (C. C. A. 8th); *Murdoch v. Clark*, *supra*; *U. S. ex rel. Yokinen v. Commissioner of Immigration*, *supra*; *United States ex rel. Ohm v. Perkins*, 79 F. (2d) 533 (C. C. A. 2d); *United States ex rel. Fortmueller v. Commissioner of Immigration*, 14 F. Supp. 484, 486-487 (S. D. N. Y.); see also *U. S. ex rel. Boric v. Marshall*, 4 F. Supp. 965, 967 (W. D. Pa.), affirmed, 67 F. (2d) 1020 (C. C. A. 3d), certiorari granted, 290 U. S. 623; dismissed on motion of petitioner 290 U. S. 709. Thus in the *Fortmueller* case, *supra*, the court (Caffey, J.) said (14 F. Supp. at 487):

"The relator stated that in 1930, the year after he came to the United States, he joined, and that he still is an active member of, a party which the courts have generally held believes in overthrowing by force or violence the government of this country. The holding, indeed, is so nearly universal that I think it would be waste of time to review the evidence introduced on the subject in the case at bar. It is sufficient for me, however, that it has been so ruled by the Circuit Court of Appeals for the Second Circuit. *United States v. Commissioner of Immigration*, 57 F. (2d) 707; *United*



## II

THERE WAS EVIDENCE IN THE RECORD BEFORE THE SECRETARY OF LABOR TO SUPPORT THE FINDING IN THE DEPORTATION WARRANT THAT RESPONDENT BELIEVES IN AND TEACHES THE OVERTHROW BY FORCE AND VIOLENCE OF THE GOVERNMENT OF THE UNITED STATES

The question of the personal beliefs of respondent was not specifically presented by the petition for writ of certiorari, as of course it did not present, under the Court's Rules, an issue calling for review by this Court. It constituted, however, one of the grounds on which the Secretary based the order of deportation (R. 64), and was considered by the Circuit Court of Appeals (R. 71). Although this Court has often stated that it is not called upon to consider such questions (cf. *Gunning v. Cooley*, 281 U. S. 90, 98), it is also well settled that it may in its discretion do so. (Cf. *Langnes v. Green*, 282 U. S. 531, 535-539); *Camp v. Gress*, 250 U. S. 308, 318; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 292; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 567-568; see also *Watts, Watts and Co. v. Unione Austriaca de Navigazione*, 248 U. S. 9, 21; *Olmstead v. United States*, 277 U. S. 458, 466.

Since *habeas corpus* was properly denied in the District Court if any one of the grounds contained

*States v. Com'r of Immigration, Ellis Island*, 65 F. (2d) 598; *United States v. Reimer*, 79 F. (2d) 315. That binds me."

Such a position, however, is not required in the instant case in view of the evidence.

in the warrant of deportation is sustainable, and since consideration was given the instant point in the Circuit Court of Appeals, it would seem that this Court has the power, if it desires to exercise it, to consider the point in order to effect a complete disposition of the litigation; and accordingly we submit it for consideration.

Under the test established by the *Vajtauer* case (*supra*, pp. 15-16), the finding of the Secretary in the warrant of deportation that the respondent believes in and teaches the overthrow of this Government by force and violence, should be sustained if there is *any* evidence to support it. We have heretofore pointed out that under the decisions such belief and teaching need not relate to an immediate overthrow of the Government of the United States.

The evidence discussed under Point I discloses that respondent not long before the issuance of the warrant of arrest had been a member of the Communist Party and that an objective of the Party was the overthrow, through violent revolutionary action, of the Government. A sworn statement by the respondent made on September 16, 1933, before the Acting Director of Naturalization at a hearing held by the latter in connection with a pending petition for naturalization filed by the respondent (R. 38-44), which statement was introduced in evidence at the first deportation hearing (R. 11), reveals that petitioner testified as

follows: that he purchased \$1,588 worth of Soviet bonds about July 1933, four months before this country established diplomatic relations with the Soviet Government; that he was urged to buy these bonds in Communistic literature received from New York; that he might have distributed Communistic literature; that he read a Communistic newspaper; that he did not consider himself a Communist "because I am not paying dues to the Communist Party"; and that he had "read Marx's books and Marx states that sooner or later there will be a Red Government in every country in the world" (R. 42-43).

In his testimony at the preliminary examination before an Immigration Inspector on October 25, 1933, heretofore referred to (*supra*, p. 42), and likewise introduced in evidence at the first deportation hearing (R. 10), petitioner stated (R. 32-33) that at the time of his initiation into the Communist Party he was familiar with its intents and purposes; that he acquired prior knowledge of Communism from a study of the writings of Marx over a period of about ten years; that he was in accord with Marx in regard to the social order of things; that the Communist Party of America proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that the leaders of communism say that it will resort to armed force in the event that it should be necessary; that he would not personally bear arms against the present United States Gov-

ernment "because Communism is not strong enough now." In answer to the question "Do you think that the present form of Government in the United States should be destroyed and a Communistic or Russian form of Government establish[ed] in the United States?" he answered "I think that the destruction of capitalism is inevitable and that the sooner it comes the better off we shall all be" (R. 33). He also testified that he had "handed out" some papers which he had received from the Kansas City headquarters of the Party and which called upon the people to unite against Capitalism, which meant "the present Government of the United States" (R. 33). When asked whether his party leader had advised him not to become too active in that he might be subject to deportation, he replied, "Something like that" (R. 34).

One Florence Levering, who worked at the respondent's restaurant in Hot Springs, Arkansas, for about three years (R. 18, 20) and who was respondent's mistress for about five years (R. 24, 40), testified at the first deportation hearing that respondent in his conversation with her had told her that he was a Communist (R. 18); that he thought there would be a revolution before the country would be any better than it was (R. 19); that "most everybody in town thinks" respondent is a Communist (R. 23); that respondent in the last year or two before the hearing "talked [Communism] to anybody" (R. 24); that respondent asked her before the presidential election in 1932

to distribute Communistic handbill; that he told her to be sure to put the bills out at night and that if she did not want to distribute them to get some Negro boys to do it for her (R. 26).

This résumé of testimony before the Secretary of Labor discloses, we submit, that there was at least *some* evidence to support the finding in the warrant of deportation that respondent believes in and teaches the overthrow by force and violence of the Government of the United States and that consequently the order of deportation should be upheld under the principles enunciated in the *Vajtauer* case (*supra*, pp. 15-16). While this testimony related to events and occurrences prior to the deportation hearings, there was no testimony on behalf of the respondent showing that he had changed his views, and the testimony for him, so far as it has any pertinence, was devoted either to an attempt to explain away the damaging testimony introduced against him or to a disavowal that he ever believed in or advocated the overthrow of this Government by force and violence (R. 14-16, 53-56). Such testimony, of course, created merely a conflict in the evidence before the Secretary, the resolving of which was a matter within the province of the Secretary and not within that of a court. *Berkman v. Tillinghast*, 58 F. (2d) 621, 622 (C. C. A. 1st); *Greco v. Haff*, 63 F. (2d) 863, 864 (C. C. A. 9th), *supra*; *United States ex rel. Fortmueller v. Commissioner of Immigration*, 14 F. Supp. 484, 487 (S. D. N. Y.), *supra*. The ques-



tion on *habeas corpus* is not, of course, whether the Secretary reached a correct decision but whether there was *any* evidence to support the finding. Comparable evidence has been held sufficient to support deportation in *United States ex rel. Vojewvic v. Curran*, 11 F. (2d) 683, 684 (C. C. A. 2d), certiorari denied, 271 U. S. 683; *Saksagansky v. Weedin*, 53 F. (2d) 13, 14-16 (C. C. A. 9th); *Wolck v. Weedin*, 58 F. (2d) 928, 930 (C. C. A. 9th), *supra*; *Sormunen v. Nagle*, 59 F. (2d) 398, 399 (C. C. A. 9th); *United States ex rel. Lisafeld v. Smith*, 2 F. (2d) 90, 91 (W. D. N. Y.); *United States ex rel. Fortmueller v. Commissioner of Immigration, supra*. See also *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106-111.

Also, as bearing upon the question whether there was any evidence before the Secretary to support the deportation order, it may be pointed out that two District Judges were of the view that *habeas corpus* should be denied and that they therefore necessarily came to the conclusion that there was some evidence to support at least one of the findings contained in the deportation warrant. See *Salinger v. Loisel*, 265 U. S. 224, 231-232.

### III

THE CIRCUIT COURT OF APPEALS ERRED IN REMANDING THE CASE FOR A TRIAL DE NOVO IN THE DISTRICT COURT.

The original judgment of the Circuit Court of Appeals simply reversed the order of the District Court and remanded the cause to it (R. 74). There-

after the court denied a petition for rehearing filed by the Government (R. 74-76), but without the request of either party the judgment was amended to read "Reversed, with directions to try the issues *de novo* as suggested in *Ex Parte Fierstein*, 41 Fed. (2d) p. 54" (R. 77). A second petition for rehearing and to set aside the amended judgment was thereupon filed by the Government urging that a trial *de novo* in the District Court was an improper disposition of the case (R. 80-81). This petition was entertained by the court and denied (R. 83). The action of the Circuit Court of Appeals in ordering a trial *de novo* was specified in the Government's petition for a writ of certiorari (p. 5) as an error to be urged.

Prior to the amending of its judgment to provide for a trial *de novo* of the issues in the District Court, the Circuit Court of Appeals had in one sentence (R. 71) of its four-page opinion (R. 71-74) rejected the respondent's contention that the hearings in the Labor Department were unfair and had, in accepting the respondent's contention that the evidence did not support the findings in the warrant of deportation, devoted most of the remainder of its opinion to that question. It would therefore seem that the Circuit Court of Appeals, in remanding the case for a trial *de novo*, did not intend a retrial of the issue of the fairness of the Labor Department hearings. What it undoubtedly had in mind was a remanding of the case to the District Court for a trial which

would comprehend the introduction of evidence with reference to the truth of the charges upon which the Secretary found the respondent deportable. This is indicated by the fact that the Circuit Court of Appeals denied a petition for rehearing by the Government at the time it ordered the trial *de novo* in the District Court (R. 77) and that Judge Sibley dissented from the denial of this petition, on the ground that there should be a rehearing in the Circuit Court of Appeals at which consideration should be given to the significance of the references to the Third Communist International contained in the membership book issued to respondent by the Communist Party of the United States and to the question whether the objectives and programs of the two organizations could be judicially noticed (R. 77). This view of the remand is also supported by the Court's reference to the decision of the Circuit Court of Appeals for the Ninth Circuit in *Ex parte Fierstein*, 41 F. (2d) 53, in directing the trial *de novo* in the District Court. In that case the only testimony before the District Court or considered by the Board of Review of the Labor Department was that of a detective, who arrested Fierstein, that he had no doubt from reading documents issued by the Workers' Communist Party of America and the Communist International while he was a member of the Workers Party of America seven years before the arrest, that the Communist Party believes in, teaches, and advocates the overthrow of this Government by force.

Although the Circuit Court of Appeals held that this evidence was not sufficient to justify deportation on the ground specified in the warrant, it nevertheless reversed and remanded the case for a trial *de novo* in the District Court, citing, among other decisions, the decisions of this Court in *Ng Fung Ho v. White*, 259 U. S. 276, and *Chin Yow v. United States*, 208 U. S. 8, 13.

From the citation of these decisions it would appear that the Circuit Court of Appeals for the Ninth Circuit in the *Fierstein* case and the Circuit Court of Appeals in the instant case, in directing a new trial in the District Court, misapplied the decisions of this Court holding that in deportation cases the issue of alienage or citizenship is one which may be tried *de novo* in the District Court on *habeas corpus*. The distinction between such an issue and that involved in the instant case was thus pointed out by the Circuit Court of Appeals for the Sixth Circuit in *Exedahtelos v. Fluckey*, 54 F. (2d) 858, 859:

"Congress may properly devolve a proceeding to enforce regulations under which aliens are permitted to remain within the United States upon an executive department." *Zakonaite v. Wolf*, 226 U. S. 272, 33 S. Ct. 31, 57 L. Ed. 218. The courts may interfere (where citizenship is not claimed) only where there has been a denial of a fair hearing, or the finding was not supported by evidence, or there was an application of

an erroneous rule of law. *Ng Fung Ho v. White*, 259 U. S. 276, 284, 42 S. Ct. 492, 66 L. Ed. 938. Where, as here, the proceeding is wholly executive in its nature, constitutional courts should not assume jurisdiction to decide the fact issues. Cf. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 469, 50 S. Ct. 389, 74 L. Ed. 969.

Where a question of citizenship is involved, the case obviously stands upon a different foundation. Alienage is essential to jurisdiction by the department (*Bilokumsky v. Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221), and it is now definitely established that jurisdiction of the federal courts to determine this question of status may be invoked in habeas corpus proceedings. (*Chin Yow v. United States*, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369; *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; *Ng Fung Ho v. White*, supra; *In re Chan Foo Lin*, 243 F. 137 (C. C. A. 6); *In re Can Pon*, 168 F. 479 (C. C. A. 9).

The Circuit Court of Appeals for the Sixth Circuit accordingly rejected the practice followed in cases in the Eighth and Ninth Circuits, including the *Fierstein* case, and reversed an order of the District Court based upon evidence taken in a trial *de novo* in that court upon the merits of the charge contained in the warrant where that court had previously held that the evidence before the immigration officers was not sufficient to support the warrant. The Circuit Court of Appeals pointed



out that where the District Court concludes that the deportation order is not supportable by evidence and there is absent the issue of alienage or citizenship, two courses are open: an order of absolute discharge from custody or an order of conditional discharge subject to further proceedings being taken by the immigration officers within a designated time.<sup>16</sup>

The amendment of the judgment of reversal in the instant case to provide for a trial *de novo* in the District Court was also contrary to the prior decision of the court below in *Lindsey v. Dobra*, 62 F. (2d) 116, 117 (C. C. A. 5th), where the court held:

The taking in the District Court of additional evidence on the merits was excepted to. Though the evidence adduced does not appear to be of controlling importance, we must hold its reception to be improper. Aside from questions of citizenship or coercion or fraud in the hearing, a retrial of fact issues on new evidence is not in order. *Exedahtelos v. Fluckey* (6 C. C. A.), 54 F. (2d) 858. Where additional evidence on the merits is allowed in the District Court, it should be only after the order of deportation has been condemned as invalid and for the purpose of settling the question whether the

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<sup>16</sup> The court recognized that while a trial *de novo* might not be had in the District Court to establish the truth of the charges in the warrant of deportation, that court might take evidence to determine which of the two courses above referred to it should follow (p. 858).

court should discharge the alien or hold him for further hearing before the executive authorities. *Whitfield v. Hanges* (C. C. A.), 222 F. 745, 747.

Since the Circuit Court of Appeals, we submit, erroneously ordered a trial *de novo* in the District Court in the instant case, this Court, if it concludes that the judgment of reversal was correct, should nevertheless modify the judgment to eliminate the direction for a new trial in the District Court.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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## APPENDIX A

### STATUTORY PROVISIONS

Act of March 3, 1903, c. 1012, Sections 2, 21, 38, 32 Stat. 1214, 1218-1219, 1221, as pertinent, provides:

SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or *persons who believe in or advocate the overthrow by force or violence of the Government of the United States* or of all government or of all forms of law, or the assassination of public officials; prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution; those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein; and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to

one of the foregoing excluded classes; but this section shall not be held to prevent persons living in the United States from sending for a relative or friend who is not of the foregoing excluded classes: *Provided*, That nothing in this Act shall exclude persons convicted of an offense purely political, not involving moral turpitude: *And provided further*, That skilled labor may be imported, if labor of like kind unemployed can not be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.

SEC. 20. That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came at any time within two years after arrival at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section one of this Act.

SEC. 21. That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this Act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section twenty of this Act, or,

if that can not be so done, at the expense of the immigrant fund provided for in section one of this Act; and neglect or refusal on the part of the masters, agents owners, or consignees of vessels to comply with the order of the Secretary of the Treasury to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this Act.

SEC. 38. *That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of the Treasury under such rules and regulations as he shall prescribe. [Italics ours.]*

Act of February 20, 1907, c. 1134, Sections 2, 21, 38; 34 Stat. 898, 899, 904-905, 908-909, as pertinent, provides:

SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: \* \* \*; polygamists, or persons who admit their belief in the practice of polygamy, anarchists, or persons who



*believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials;*

Sec. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the expense of the "immigrant fund" provided for in section one of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came: *Provided*, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that

an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: *Provided*, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner.

SEC. 38. *That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof.*

This section shall be enforced by the Secretary of Commerce and Labor under such rules and regulations as he shall prescribe. [Italics ours.]

Act of February 5, 1917, c. 29, Sections 3, 19, 39 Stat. 874, 875-878, 889-890, as pertinent, provides:

SEC. 3. That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers, professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy; anarchists, or *persons who believe in or advocate the overthrow by force or violence of the Government of the United States*, or of all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; *persons who are members of or affiliated with any organization entertaining and teaching disbelief in or opposition to*

*organized government*, or who advocate or teach the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who advocate or teach the unlawful destruction of property; prostitutes, or persons coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who directly or indirectly procure or attempt to procure or import prostitutes or persons for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons hereinafter called contract laborers, who have been induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment, whether such offers or promises are true or false, or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; persons who have come in consequence of advertisements for laborers printed, published, or distributed in a foreign country; persons likely to become a public charge; persons who have been deported under any of the provisions of this Act, and who may again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a foreign port or their attempt to be admitted from foreign contiguous territory the Secretary of Labor shall have consented to their reapplying for admission; persons whose tickets or passage is paid for with the money of another, or

who are assisted by others to come, unless it is affirmatively and satisfactorily shown that such persons do not belong to one of the foregoing excluded classes; persons whose ticket or passage is paid for by any corporation, association, society, municipality, or foreign Government, either directly or indirectly; stowaways, except that any such stowaway, if otherwise admissible, may be admitted in the discretion of the Secretary of Labor; all children under sixteen years of age, unaccompanied by, or not coming to one or both of their parents, except that any such children may, in the discretion of the Secretary of Labor, be admitted if in his opinion they are not likely to become a public charge and are otherwise eligible; unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States. The provision next foregoing, however, shall not



apply to persons of the following status or occupations: Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travelers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States, but such persons or their legal wives or foreign-born children who fail to maintain in the United States a status or occupation placing them within the excepted classes shall be deemed to be in the United States contrary to law, and shall be subject to deportation as provided in section nineteen of this Act. [*Italics ours.*]

That after three months from the passage of this Act, in addition to the aliens who are by law now excluded from admission into the United States, the following persons shall also be excluded from admission thereto, to wit:

All aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish: *Provided*, That any admissible alien, or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not; and such relative shall be permitted to enter. That for the purpose of ascertaining whether aliens can read the immigrant inspectors shall be furnished with slips of uni-

form size, prepared under the direction of the Secretary of Labor; each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type in some one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made, and shall be required to read the words printed on the slip in such language or dialect: That the following classes of persons shall be exempt from the operation of the illiteracy test, to wit: All aliens who shall prove to the satisfaction of the proper immigration officer or to the Secretary of Labor that they are seeking admission to the United States to avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith; all aliens who have been lawfully admitted to the United States and who have resided therein continuously for five years, and who return to the United States within six months from the date of their departure therefrom; all aliens in transit through the United States; all aliens who have been lawfully admitted to the United States and who later shall go in transit from one part of the United States to another through foreign contiguous territory: *Provided*, That nothing in this Act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political: *Provided further*, That the provisions of this Act, relating to the payments for tickets or passage

by any corporation, association, society, municipality, or foreign Government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: *Provided further*, That skilled labor, if otherwise admissible, may be imported if labor of like kind unemployed can not be found in this country, and the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case: *Provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, nurses; ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed as domestic servants: *Provided further*, That whenever the President shall be satisfied that passports issued by any foreign Government to its citizens or subjects to go to any country other than the United States, or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holder to come to the continental territory of the United States to the detriment of labor conditions therein, the President shall refuse to permit such citizens or subjects of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone:

*Provided further*, That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe: *Provided further*, That nothing in the contract-labor or reading-test provisions of this Act shall be construed to prevent, hinder, or restrict any alien exhibitor, or holder of concession or privilege for any fair or exposition authorized by Act of Congress, from bringing into the United States, under contract, such otherwise admissible alien mechanics, artisans, agents, or other employees, natives of his country, as may be necessary for installing or conducting his exhibit or for preparing for installing or conducting any business authorized or permitted under any concession or privilege which may have been or may be granted by any such fair or exposition in connection therewith, under such rules and regulations as the Commissioner General of Immigration, with the approval of the Secretary of Labor, may prescribe both as to the admission and return of such persons: *Provided further*, That the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission: *Provided further*, That nothing in this Act shall be construed to apply to accredited officials of foreign Governments, nor to their suites, families, or guests.

SEC. 19. That at any time within five years after entry, any alien who at the time

of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or



attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: *Provided*, That the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this Act shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this Act: *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge

thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment: *Provided further*, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States: *Provided further*, That the provisions of this section shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof: *Provided further*, That any person who shall be arrested under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

Act of October 16, 1918, c. 186, Sections 1 and 2, 40 Stat. 1012, provides:

SEC. 1. That aliens who are anarchists; *aliens who believe in or advocate the overthrow by force or violence of the Govern-*

*ment of the United States* or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; *aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States* or of all forms of law, or that entertains or teaches disbelief in, or opposition to, all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property shall be excluded from admission into the United States.

SEC. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or *to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act*, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States. (U. S. C., Title 18, Sec. 136 (g).) [Italics ours.]

Act of June 5, 1920, c. 251, 41 Stat. 1008-1009 (U. S. C., Title 8, Sec. 137 (a)-(b)), provides:

That section 1 of the Act entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes," approved October 16, 1918, is amended to read as follows:

"That the following aliens shall be excluded from admission into the United States:

"(a) Aliens who are anarchists;

"(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

"(c) Aliens who believe in, advise, advocate, or teach, or *who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of all forms of law, or (2) government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;*

"(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, pub-

lication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

"(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision. (d).

"For the purpose of this section (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described, shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." [Italics ours.]



## APPENDIX B

### Program of the Communist International, Chapter VI, section 2:<sup>1</sup>

#### 2. THE FUNDAMENTAL TASKS OF COMMUNIST STRATEGY AND TACTICS

The successful struggle of the Communist International for the dictatorship of the proletariat presupposes the existence in every country of a compact Communist Party, hardened in the struggle, disciplined, centralized, and closely linked up with the masses.

*The Party* is the vanguard of the working class and consists of the best, most class-conscious, most active, and most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle. Basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will, and of proletarian revolutionary action. It is a revolutionary organization, bound by iron discipline and strict revolutionary rules of democratic centralism, which can be carried out thanks to the class consciousness of the proletarian vanguard, to its loyalty to the revolution, its ability to maintain inseparable ties with the proletarian masses, and to its correct political

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<sup>1</sup>Published by Workers Library Publishers, Inc. (N. Y., 2d ed., 1933), pp. 78-87.

leadership, which is constantly verified and clarified by the experiences of the masses themselves.

In order that it may fulfill its historic mission of achieving the dictatorship of the proletariat, the Communist Party must first of all set itself and accomplish the following fundamental *strategic* aims:

Extend its influence over the *majority of members of its own class*, including working women and the working youth. To achieve this the Communist Party must secure predominant influence in the broad mass proletarian organizations (Soviets, trade unions, factory committees, cooperative societies, sport organizations, cultural organizations, etc.). It is particularly important for the purpose of winning over the majority of the proletariat, to capture the *trade unions*, which are genuine mass working-class organizations closely bound up with the every-day struggles of the working class. To work in reactionary trade unions and skillfully to capture them, to win the confidence of the broad masses of the industrially organized workers, to change and "remove from their posts" the reformist leaders, represent important tasks in the preparatory period.

The achievement of the dictatorship of the proletariat presupposes also that the proletariat acquires hegemony over *wide sections of the toiling masses*. To accomplish this the Communist Party must extend its influence over the masses of the urban and rural poor, over the lower strata of the intelligentsia and over the so-called small man, i. e., the petty-bourgeois strata generally. It is particularly important that work be carried on for the purpose of ex-

tending the Party's influence over the *peasantry*. The Communist Party must secure for itself the whole-hearted support of that stratum of the rural population that stands closest to the proletariat, i. e., the agricultural laborers and the rural poor. To this end, the agricultural laborers must be organized in separate organizations; all possible support must be given them in their struggles against the rural bourgeoisie, and strenuous work must be carried on among the small allotment farmers and small peasants. In regard to the middle strata of the peasantry in developed capitalist countries, the Communist Parties must conduct a policy to secure their neutrality. The fulfillment of all these tasks by the proletariat—the champion of the interests of the whole people and the leaders of the broad masses in their struggle against the oppression of finance capital—is an essential condition precedent for the victorious Communist revolution.

The tasks of the Communist International connected with the revolutionary struggle in *colonies, semi-colonies, and dependencies* are extremely important strategic tasks in the world proletarian struggle. The colonial struggle presupposes that the broad masses of the working class and of the peasantry in the colonies be rallied around the banner of the revolution; but this cannot be achieved unless the closest cooperation is maintained between the proletariat in the oppressing countries and the toiling masses in the oppressed countries.

While organizing, under the banner of the proletarian dictatorship, the revolution against imperialism in the so-called civilized States, the Communist International supports every movement against imperialist

violence in the colonies, semi-colonies, and dependencies themselves (for example Latin-America); it carries on propaganda against all forms of chauvinism and against the imperialist maltreatment of enslaved peoples and races, big and small (treatment of Negroes, "yellow labor," anti-semitism, etc.), and supports their struggles against the bourgeoisie of the oppressing nations. The Communist International especially combats the chauvinism that is preached in the Empire-owning countries by the imperialist bourgeoisie as well as by its social-democratic agency, the Second International, and constantly holds up in contrast to the practices of the imperialist bourgeoisie and the practice of the Soviet Union, which has established relations of fraternity and equality among the nationalities inhabiting it.

The Communist Parties in the *imperialist countries* must render systematic aid to the colonial revolutionary liberation movement and to the movement of oppressed nationalities generally. The duty of rendering active support to these movements rests primarily upon the workers in the countries upon which the oppressed nations are economically, financially or politically dependent. The Communist Parties must openly recognize the right of the colonies to separation and their right to carry on propaganda for this separation, i. e., propaganda in favor of the independence of the colonies from the imperialist State; they must recognize their right of armed defense against imperialism (i. e., the right of rebellion and revolutionary war) and advocate and give active support to this defense by all the means in their power. The Communist Parties must adopt this line of policy in regard to all oppressed nations.

The Communist Parties in the *colonial and semi-colonial countries* must carry on a bold and consistent struggle against foreign imperialism and unfailingly conduct propaganda in favor of friendship and unity with the proletariat in the imperialist countries. They must openly advance, conduct propaganda for and carry out the slogan of agrarian revolution, rouse the broad masses of the peasantry for the overthrow of the landlords and combat the reactionary and medieval influence of the clergy, of the missionaries and other similar elements.

In these countries, the principal task is to organize the workers and the peasantry *independently*, (to establish class Communist Parties of the proletariat, trade unions, peasant leagues and committees and, in a revolutionary situation, Soviets, etc.), and to free them from the influence of the national bourgeoisie, with whom temporary agreements may be made only on the condition that they, the bourgeoisie, do not hamper the revolutionary organization of the workers and peasants, and that they carry on a genuine struggle against imperialism.

In determining its line of *tactics*, each Communist Party must take into account the concrete internal and external situation, the correlation of class forces, the degree of stability and strength of the bourgeoisie, the degree of preparedness of the proletariat, the position taken up by the various intermediary strata in its country, etc. The Party determines its slogans and methods of struggle in accordance with these circumstances, with the view to organizing and mobilizing the masses on the broadest possible scale and on the highest possible level of this struggle.



When a revolutionary situation is developing, the Party advances certain transitional slogans and partial demands corresponding to the concrete situation; but these demands and slogans must be bent to the revolutionary aim of capturing power and of overthrowing bourgeois capitalist society. The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor every-day needs as a *starting point* from which to lead the working class to the *revolutionary struggle for power*.

When the revolutionary tide is rising, when the ruling classes are disorganized, the masses are in a state of revolutionary ferment, the intermediary strata are inclining towards the proletariat and the masses are ready for action and for sacrifice, the Party of the proletariat is confronted with the task of leading the masses to a direct attack upon the bourgeois State. This it does by carrying on propaganda in favor of increasingly radical transitional slogans (for Soviets, workers' control of industry, for peasant committees for the seizure of the big landed properties, for disarming the bourgeoisie and arming the proletariat, etc.), and by organizing *mass action*, upon which all branches of the Party agitation and propaganda, including parliamentary activity, must be concentrated. This mass action includes: a combination of strikes and demonstrations; a combination of strikes and armed demonstrations; and finally, the general strike conjointly with armed insurrection against the State power of the bourgeoisie. The latter form of struggle, which is the supreme form, must

be conducted according to the rules of war; it presupposes a plan of campaign, offensive fighting operations and unbounded devotion and heroism on the part of the proletariat. An absolutely essential condition precedent for this form of action is the organization of the broad masses into militant units, which, by their very form, embrace and set into action the largest possible numbers of toilers (Councils of Workers' Deputies, Soldiers' Councils, etc.), and intensified revolutionary work in the army and the navy.

In passing over to new and more radical slogans, the Parties must be guided by the fundamental role of the political tactics of Leninism, which call for ability to lead the masses to revolutionary positions in such a manner that the masses many [may], by their own experience, convince themselves of the correctness of the Party line. Failure to observe this rule must inevitably lead to isolation from the masses, to putschism, to the ideological degeneration of Communism into "Leftist" dogmatism and to petty-bourgeois "revolutionary" adventurism. Failure to take advantage of the culminating point in the development of the revolutionary situation, when the Party of the proletariat is called upon to conduct a bold and determined attack upon the enemy, is not less dangerous. To allow that opportunity to slip by and to fail to start rebellion at that point, means to allow the initiative to pass to the enemy and to doom the revolution to defeat.

When the *revolutionary tide is not rising*, the Communist Parties must advance *partial* slogans and demands that correspond to the every-day needs of the toilers, and com-

bine them with the fundamental tasks of the Communist International. The Communist Parties must not, however, at such a time, advance *transitional* slogans that are applicable only to revolutionary situations (for example workers' control of industry, etc.). To advance such slogans when there is no revolutionary situation means to transform them into slogans that favor merging with the capitalist system of organization. Partial demands and slogans generally form an essential part of correct tactics; but certain transitional slogans go inseparably with a revolutionary situation. Repudiation of partial demands and *transitional* slogans "on principle", however, is incompatible with the tactical principle of Communism, for in effect such repudiation condemns the Party to inaction and isolates it from the masses. *United front tactics* also occupy an important place in the tactics of the Communist Parties throughout *the whole pre-revolutionary period* as a means towards achieving success in the struggle against capital, towards the class mobilization of the masses and the exposure and isolation of the reformist leaders.

The correct application of united front tactics and the fulfillment of the general task of winning over the masses presupposes in their turn systematic and persistent work in the *trade unions* and other mass proletarian organizations. It is the bounden duty of every Communist to belong to a trade union, even a most reactionary one, provided it is a mass organization. Only by constant and persistent work in the trade unions and in the factories for the steadfast and energetic defense of the interests of the workers, together with ruthless struggle

against the reformist bureaucracy, will it be possible to win the leadership in the workers' struggle and to win the industrially organized workers over to the side of the Party.

Unlike the reformists, whose policy is to split the trade unions, the Communists defend *trade union unity* nationally and internationally on the basis of the class struggle, and render every support to and strengthen the work of the *Red International of Labor Unions*.

In universally championing the current every-day needs of the masses of the workers and of the toilers generally, in utilizing the bourgeois parliament as a platform for revolutionary agitation and propaganda, and subordinating the partial tasks to the struggle for the dictatorship of the proletariat, the Parties of the Communist International advance partial demands and slogans in the following main spheres:

In the sphere of *labor*, in the narrow meaning of the term, i. e. questions concerned with the *industrial struggle* (the fight against the trustified capitalist offensive, wage questions, the working day, compulsory arbitration, unemployment), which *grow* into questions of the general political struggle (big industrial conflicts, fight for the right to organize, right to strike, etc.); in the sphere of *politics* proper (taxation, high cost of living, Fascism, persecution of revolutionary parties, white terror and current politics generally); and finally the sphere of *world politics*; viz, attitude towards the U. S. S. R. and colonial revolutions, struggle for the unity of the international trade union movement, struggle against imperialism and the war danger, and systematic preparation for the fight against *imperialist war*.

In the sphere of the *peasant* problems, the partial demands are those appertaining to taxation, peasant mortgage indebtedness, struggle against usurer's capital, the land hunger of the peasant small holders, rent, the metayer (crop-sharing) system. Starting out from these partial needs, the Communist Party must sharpen the respective slogans and broaden them out into the slogans: confiscation of large estates, and workers' and peasants' government (the synonym for proletarian dictatorship in developed capitalist countries and for democratic dictatorship of the proletariat and peasantry in backward countries and in certain colonies).

Systematic work must also be carried on among the proletarian and peasant *youth* (mainly through the Young Communist International and its sections) and also among *working women and peasant women*. This work must concern itself with the special conditions of life and struggle of the working and peasant women, and their demands must be linked up with the general demands and fighting slogans of the proletariat.

In the struggle against *colonial oppression*, the Communist Parties *in the colonies* must advance partial demands that correspond to the special circumstances prevailing in each country such as: complete equality for all nations and races; abolition of all privileges for foreigners; the right of association for workers and peasants; reduction of the working day; prohibition of child labor; prohibition of usury and of all transactions entailing bondage; reduction and abolition of rent; reduction of taxation; refusal to pay taxes, etc. All these partial slogans must be subordinate to the fundamental demands of the Communist Parties such as:



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complete political national independence and the expulsion of the imperialists, workers' and peasants' government, the land to the whole people, eight-hour day, etc. The Communist Parties in *imperialist countries*, while supporting the struggle proceeding in the colonies, must carry on a campaign in their own respective countries for the withdrawal of imperialist troops, conduct propaganda in the army and navy in defense of the oppressed countries fighting for their liberation, mobilize the masses to refuse to transport troops and munitions and, in connection with this, to organize strikes and other forms of mass protest, etc.

The Communist International must devote itself especially to systematic preparation for the struggle against the *danger of imperialist wars*. Ruthless exposure of social chauvinism, of social imperialism, and of pacifist phrasemongering intended to camouflage the imperialist plans of the bourgeoisie; propaganda in favor of the principal slogans of the Communist International; everyday organization work in connection with this, in the course of which work legal methods must unfailingly be combined with illegal methods; organized work in the army and navy—such must be the activity of the Communist Parties in this connection. The fundamental slogans of the Communist International in this connection must be the following: Convert imperialist war into civil war; defeat the "home" imperialist government; defend the U. S. S. R. and the colonies by every possible means in the event of imperialist war against them. It is the bounden duty of all Sections of the Communist International, and of every one of its members, to carry

on propaganda for these slogans, to expose the "Socialistic" sophisms and the "Socialist" camouflage of the League of Nations and constantly to keep to the front the experiences of the war of 1914-1918.

In order that revolutionary work and revolutionary action may be coordinated and in order that these activities may be guided most successfully, the international proletariat must be bound by *international class discipline*, for which, first of all, it is most important to have the strictest international discipline in the Communist ranks.

The international Communist discipline must find expression in the subordination of the partial and local interests of the movement to its general and lasting interests and in the strict fulfillment, by all members, of the decisions passed by the leading bodies of the Communist International.

Unlike the Social-Democratic, Second International, each section of which submits to the discipline of "its own," national bourgeoisie and of its own "fatherland," the sections of the Communist International submit to only one discipline, viz., international proletarian discipline, which guarantees victory in the struggle of the world's workers for world proletarian dictatorship. Unlike the Second International, which splits the trade unions, fights against colonial peoples, and practices unity with the bourgeoisie, the Communist International is an organization that guards proletarian unity in all countries and the unity of the toilers of all races and all peoples in their struggle against the yoke of imperialism.

Despite the bloody terror of the bourgeoisie, the Communists fight with courage and devotion on all sectors of the international

class front, in the firm conviction that the victory of the proletariat is inevitable and cannot be averted.

*"The Communists disdain to conceal their views and aims. They openly declare that their aims can be attained only by the forcible overthrow of all the existing social conditions. Let the ruling class tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win.*

*"Workers of all countries, unite!"*  
[Italics in original.]<sup>2</sup>

---

<sup>2</sup> These final two paragraphs of the Program are taken from the concluding paragraphs of The Communist Manifesto, by Marx and Engels, issued in 1848.

## APPENDIX C

### The Twenty-one Conditions of Admission Into the Communist International:<sup>1</sup>

The Second Congress of the Communist International resolves that the conditions for membership in the Communist International shall be as follows:

1. The daily propaganda and agitation must bear a truly Communist character and correspond to the program and all the decisions of the Third International. All the organs of the press that are in the hands of the Party must be edited by reliable Communists who have proved their loyalty to the cause of the proletarian revolution. The dictatorship of the proletariat should not be spoken of simply as a current hackneyed formula; it should be advocated in such a way that its necessity should be apparent to every rank-and-file working man and woman, each soldier and peasant, and should emanate from the facts of everyday life systematically recorded by our press day after day.

The periodical and non-periodical press and all Party publishing organizations must be wholly subordinate to the Central Committee of the Party, irrespective as to whether the Party as a whole, at the given moment, is legal or illegal. That publishing organizations, abusing their autonomy,

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<sup>1</sup> Adopted at the Second Congress of the Communist International held in Moscow, July 17 to August 7, 1920. Published by Workers Library Publishers, Inc. (N. Y., 1934).



should pursue a policy that does not completely correspond to the policy of the Party cannot be tolerated.

In the columns of the newspapers, at public meetings, in the trade unions, in the cooperative societies—wherever the adherents of the Third International gain access, they must systematically and mercilessly denounce not only the bourgeoisie, but also its assistants, the reformists of every shade.

2. Every organization desiring to belong to the Communist International must steadily and systematically *remove* from all responsible posts in the Labor movement in the Party organization, editorial boards, trade unions, parliamentary fractions, cooperative societies, municipalities, etc., all reformists and followers of the "Center," and have them replaced by Communists even at the cost of replacing at the beginning, "experienced" leaders by rank-and-file workingmen.

3. The class struggle in almost all the countries of Europe and America is entering the phase of civil war. Under such conditions the Communists can have no confidence in bourgeois law. They must *everywhere* create a parallel illegal apparatus, which at the decisive moment could assist the Party in performing its duty to the revolution. In all countries where, in consequence of martial law or exceptional laws, the Communists are unable to carry on all their work legally, a combination of legal and illegal work is absolutely necessary.

4. The obligation to spread Communist ideas includes the particular necessity of persistent, systematic propaganda in the army. Wherever such propaganda is forbidden by exceptional laws, it must be carried on ille-

gally. The abandonment of such work would be equivalent to the betrayal of revolutionary duty and is incompatible with membership in the Third International.

5. It is necessary to carry on systematic and steady agitation in the rural districts. The working class cannot consolidate its victory without the backing of at least part of the agricultural laborers and the poorest peasants, and without having neutralized, by its policy, a part of the rest of the rural population. Communist work in the rural districts is acquiring a predominant importance during the present period. It should be carried on in the main, by revolutionary Communist workers of both city and country only, who have connections with the rural districts. To refuse to do this work or to transfer such work to untrustworthy half-reformists is equal to renouncing the proletarian revolution.

6. Every party that desires to belong to the Third International must expose, not only open social patriotism, but also the falsity and hypocrisy of social-pacifism; it must systematically demonstrate to the workers that without the revolutionary overthrow of capitalism, no international arbitration courts, no disarmament, no "democratic" reorganization of the League of Nations will save mankind from new imperialist wars.

7. The Parties desiring to belong to the Communist International must recognize the necessity of a complete and absolute rupture with reformism and the policy of the "Center," and they must carry on propaganda in favor of this rupture among the broadest circles of the party membership. Otherwise a consistent Communist policy is impossible.

The Communist International unconditionally and peremptorily demands that this split be brought about *with the least delay*. The Communist International cannot reconcile itself to the fact that such avowed reformists, as Turatti, Kautsky, Hilferding, Hillquit, Longuet, MacDonald, Modigliani, and others should be entitled to consider themselves members of the Third International. This would make the Third International resemble, to a considerable degree, the late Second International.

8. On the question of the colonies and oppressed nationalities an especially distinct and clear line must be taken by the parties in those countries where the bourgeoisie possesses colonies or oppresses other nations. Every party desirous of belonging to the Third International must ruthlessly denounce the methods of "their own" imperialists in the colonies, supporting, not in words, but in deeds, every independence movement in the colonies. It should demand the expulsion of their own imperialists from such colonies, and cultivate among the workers of their own country a truly fraternal attitude towards the toiling population of the colonies and oppressed nationalities, and carry on systematic agitation in its own army against every kind of oppression of the colonial population.

9. Every party that desires to belong to the Communist International must carry on systematic and persistent Communist work in the trade-unions, in workers' and industrial councils, in the cooperative societies, and in other mass organizations. Within these organizations it is necessary to create Communist groups, which by means of practical and stubborn work must win over the

trade-unions, etc., for the cause of Communism. These cells should constantly denounce the treachery of the social patriots and the vacillations of the "Center," at every step. These Communist groups should be completely subordinate to the Party as a whole.

10. Every party that belongs to the Communist International must carry on a stubborn struggle against the Amsterdam "International" of yellow trade-unions. It must persistently propagate among the organized workers the necessity of a rupture with the yellow Amsterdam International. It must give all the support in its power to the incipient international alliance of the Red trade-unions affiliated to the Communist International.

11. The parties desiring to belong to the Third International must overhaul the membership of their parliamentary fractions, eliminate all unreliable elements from them, to control these fractions, not only verbally but in reality, to subordinate them to the Central Committee of the Party, and demand from every Communist member of parliament that he devote his entire activities to the interests of really revolutionary propaganda and agitation.

12. Parties belonging to the Communist International must be built up on the principle of democratic centralism. At the present time of acute civil war, the Communist Party will only be able fully to do its duty when it is organized in the most centralized manner, if it has iron discipline, bordering on military discipline, and if the Party center is a powerful, authoritative organ with wide powers, possessing the general trust of the party membership.

13. The Communist parties of those countries where the Communists' activity is legal shall make periodical cleanings (re-registration) of the members of the Party organizations, so as to systematically cleanse the party from the petty-bourgeois elements who inevitably attach themselves to it.

14. Every party that desires to belong to the Communist International must give every possible support to the Soviet Republics in their struggle against all counter-revolutionary forces. The Communist parties should carry on a precise and definite propaganda to induce the workers to refuse to transport munitions of war intended for enemies of the Soviet Republics, carry on legal or illegal propaganda among the troops, which are sent to crush the workers' republics, etc.

15. The parties which up to the present have retained their old Social-Democratic programs must in the shortest possible time overhaul these programs and draw up a new Communist program in conformity with the special conditions of their respective countries and in accordance with resolutions of the Communist International. As a rule, the program of every party that belongs to the Communist International must be ratified by the next Congress of the Communist International or by the Executive Committee. In the event of the Executive Committee of the Communist International failing to ratify the program of a particular party, that party has the right to appeal to the Congress of the Communist International.

16. All decisions of the Congresses of the Communist International, as well as the decisions of its Executive Committee, are bind-



ing on all parties affiliated to the Communist International. The Communist International, operating in the midst of most acute civil war, must have a far more centralized form of organization than that of the Second International. At the same time, the Communist International and its Executive Committee must, of course, in all their activities, take into consideration the diversity of the conditions under which the various parties have to work and fight, and should issue universally binding decisions only on questions on which the passing of such decisions is possible.

17. In connection with all this, all parties desiring to join the Communist International must change their names. Every party that desires to join the Communist International must bear the name: *Communist Party* of such-and-such country (Section of the Third, Communist International). This question as to name is not merely a formal one, but a political one of great importance. The Communist International has declared a decisive war against the entire bourgeois world and all the yellow, Social-Democratic parties. Every rank-and-file worker must clearly understand the difference between the Communist Parties and the old official "Social-Democratic" or "Socialist" parties which have betrayed the cause of the working class.

18. All the leading Party organs of the press in all countries must publish all the chief documents of the Executive Committee of the Communist International.

19. All parties belonging to the Communist International, or having made an application to join it, must, in the shortest possible period, but not later than four months

after the Second Congress of the Communist International, call special Party congresses, for the purpose of discussing these obligations. In this connection, the Central Committees must take measures to enable all the local organizations to become acquainted with the decisions of the Second Congress of the Communist International.

20. The parties that would now like to join the Third International but which have not yet radically changed their former tactics, must, before joining, take steps to ensure that their Central Committees and all most important central bodies of the respective parties, shall be composed, to the extent of at least two-thirds, of such comrades as even prior to the Second Congress of the Communist International have openly and definitely declared for joining the Third International. Exceptions may be made with approval of the Executive Committee of the Third International. The Executive Committee of the Communist the representatives of the "Center" mentioned in point 7.

21. *Members of the Party who reject the conditions and theses of the Communist International, on principle, must be expelled from the party.*

This applies also to the delegates to the special Party Congresses.





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**No. 330.**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1938.**

**EUGENE KESSLER, District Director of  
Immigration and Naturalization,**

*Petitioner,*

**v.**

**JOSEPH GEORGE STRECKER.**

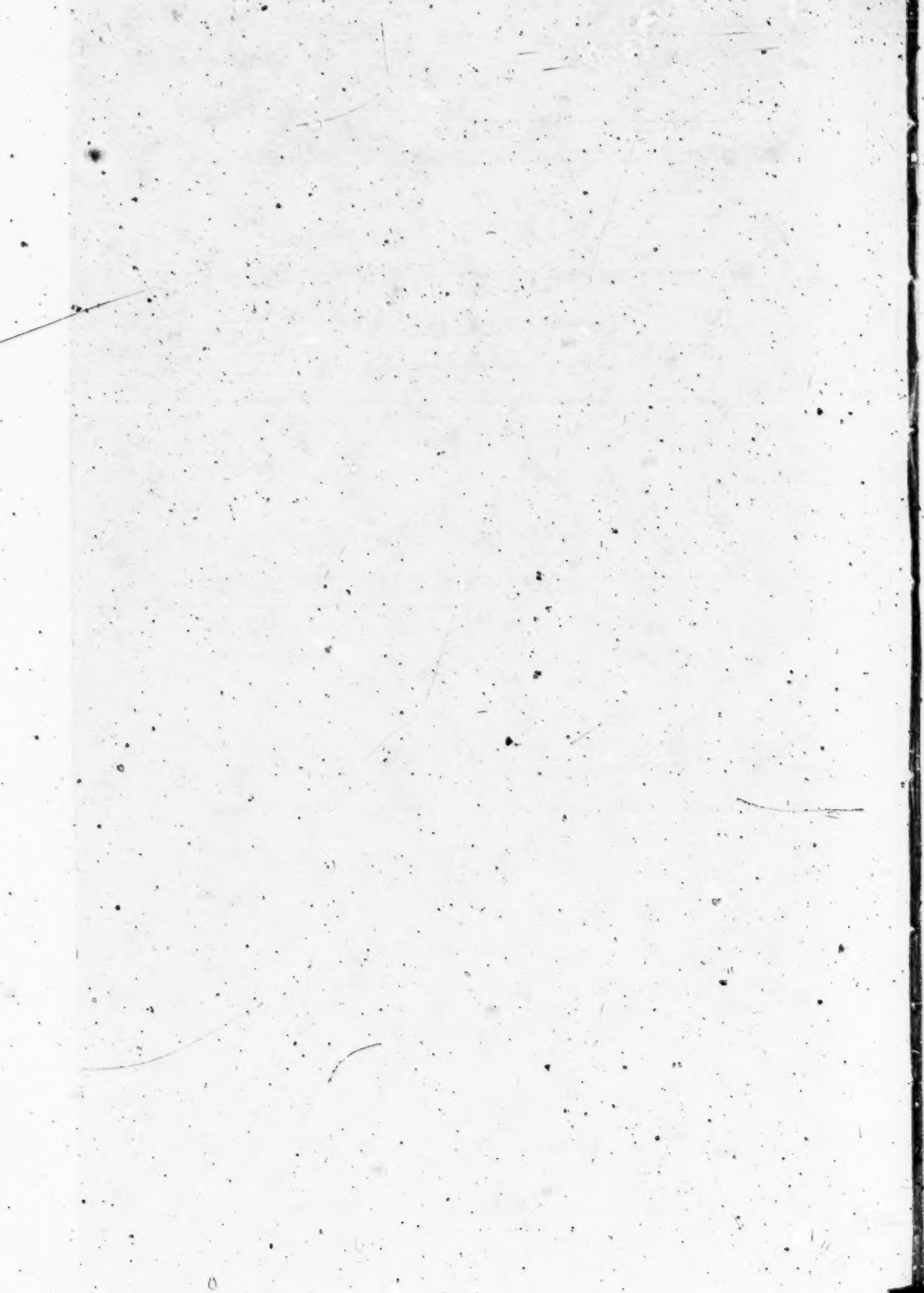
**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT.**

**BRIEF FOR THE RESPONDENT IN OPPOSITION.**

↓ **WHITNEY NORTH SEYMOUR,**  
**Attorney for Respondent.**

**C. A. STANFIELD,**  
**CAROL KING,**  
**of Counsel.**





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---

**BRIEF FOR THE RESPONDENT IN OPPOSITION.**

---

**Opinions Below.**

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 110) is reported in 95 F. (2d) 976. The opinion on rehearing (R. 117) is reported in 96 F. (2d) 1020.

### **Jurisdiction.**

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 117). An order denying a petition for rehearing was entered June 7, 1938 (R. 119), and, on the same day an order was entered amending the judgment (R. 118). An order denying a second petition for rehearing, which had been filed June 27, 1938 (R. 121), was entered July 27, 1938 (R. 124). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **Statute Involved.**

The relevant portions of the Act of October 16, 1918, c. 186, 40 Stat. 1012 as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008 (U. S. C., Title 8, Sec. 137 are set forth in the Appendix, *infra*, pages 8-9.

### **Statement.**

The facts in this case, so far as presently material, are stated with substantial accuracy in the petition. That statement should be supplemented, however, by the following extract from the "Statutes of the Communist Party of the United States" contained in petitioner's membership book:

"Members who are four weeks in arrears in payment of dues cease to be members of the Party in good standing. Members who are three months in arrears shall be stricken from the rolls. No member of the Party shall pay dues in advance for a period of more than six weeks" (R. 59).



This document is significant because, taken along with the undisputed facts that Strecker paid membership dues in the months of January and February, 1933 (R. 56), and not thereafter (R. 56), it establishes that Strecker must have been stricken from the rolls of the Party not later than the 1st day of June, 1933. The warrant of arrest did not issue, however, until the 25th day of November, 1933 (R. 14), nearly six months later. Since Strecker, therefore, was not a member of the Party at the time of the issuance of the warrant, the question necessarily involved is not whether present membership in the Communist Party constitutes a deportable offense but whether past membership constitutes such an offense.

### **Argument.**

The Government states as the reasons for granting the writ the lack of uniformity among the circuits with reference to the deportability of members of the Communist Party. The petition should be denied because

- I. The order appealed from is not a final order;
- II. There is no conflict in the decisions of the various circuits requiring review of this case.

#### **I.**

**The order appealed from is not a final order.**

Although this Court may grant a writ of certiorari at any time when a proceeding is pending in the Circuit Court of Appeals (Sec. 240 [a] of the Judicial Code as amended by the Act of February 13, 1925; Rule 39 of the Rules of the Supreme Court of the United States) and may review non-

final orders on certiorari the jurisdiction is exercised sparingly and the fact that the judgment sought to be reviewed is not final, in the absence of extraordinary circumstances, furnishes sufficient ground for the denial of the application:

*Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258 (1916);

*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408, 409 (1916);

*City and County of Denver v. New York Trust Co.*, 229 U. S. 123, 133 (1913);

*Taylor v. Louisville & Nashville Railroad Company*, 172 U. S. 647 (1898);

*The Three Friends*, 166 U. S. 1, 49 (1897);

*The Conqueror*, 166 U. S. 110, 113, 114 (1897);

*American Construction Co. v. Jacksonville, T. & K. W. Railway Co.*, 148 U. S. 372, 383, 384 (1893);

*Chicago and Northwestern Railway Company v. Osborne*, 146 U. S. 354 (1892).

See also:

*Schoenamsgruber v. Hamburg Line*, 294 U. S. 454, 458 (1935);

*Harriman v. Northwestern Securities Co.*, 197 U. S. 244, 287 (1905);

*Forgay v. Conrad*, 6 How. 201, 205-6 (1848).

In the instant case it is plain that the judgment of the Circuit Court of Appeals is not final because, subsequent to the motion for rehearing, the judgment of reversal was amended to read "Reversed, with directions to try the issues *de novo*" (96 F. [2d] 1020). This Court has been

reluctant to grant writs of certiorari in cases where the order to be reviewed does not definitively dispose of the case. By withholding review until the stage of final judgment has been reached, repeated appeals are avoided. (*Schoenamsgruber v. Hamburg Line, supra.*)

There are not present here any extraordinary or exceptional circumstances requiring the issuance of a writ at this time, before the case has been presented *de novo* to the District Court as directed by the amended judgment below.

## II.

**There is no conflict in the decisions of the various circuits requiring review of this case.**

The petition refers to various decisions and asserts that the decision below creates lack of uniformity upon the question whether membership in the Communist Party is a deportable offense. While it is true that the cases cited deal with this general question and that, in some of them, the courts appear to have taken the proscribed character of the Communist Party for granted, each depended upon its particular facts. As pointed out in *Ex parte Fierstein* (41 F. [2d] 53 [C. C. A. 9, 1930]) and by the court below in this case, the nature of the Communist Party was matter for evidence in each case, not for surmise or judicial notice and, therefore, observations not based on the records may not properly be regarded as the decisive elements in those cases. If there was, in any of those cases, improper reliance upon matters not in the particular record it may be anticipated that the opinion below will serve to suggest the impropriety of that course in future cases and the corrective process of this Court may well be withheld until such time as it is clear that other Circuit Courts are un-

willing to follow the decision below on similar records. As Judge Hutcheson said in the original opinion of the court below:

"The decisions of the Circuit Courts of Appeals in *Skeffington v. Katzeff*, 1 Cir., 277 F. 129; *Antolish v. Paul*, 7 Cir., 283 F. 957; *Ungar v. Seaman*, 8 Cir., 4 F. 2d 80, on the authority of which it was held in *Ex parte Vilarino*, 9 Cir., 50 F. 2d 582; *Kjar v. Doak*, 7 Cir., 61 F. 2d 566, upon which the appellee relies here, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience, and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute" (95 F. [2d] at p. 978).

Furthermore, it does not appear that, in any of the cases cited in the petition, documentary evidence such as is contained in the present record was treated as sufficient to justify deportation.

In its opinion the court below did not particularly advert to the fact that the respondent had ceased to be a member of the Communist Party some time before deportation proceedings were commenced although the effect of that circumstance was the chief question presented by the record and justified the absolute reversal contained in the original judgment of the court below. In only one of the cases cited by the Government was the question of the effect of past as distinguished from present membership involved (*U. S. ex rel. Yokinen v. Commissioner of Immigration*, 57 F. [2d] 707 [C. C. A. 2, 1932], certiorari denied, 287 U. S. 607 [1932]).

**CONCLUSION.**

For the foregoing reasons the petition for certiorari should be denied.

If, however, the Court should grant certiorari we suggest that review should be limited to the question now actually presented by the record in this case: whether an alien who joined the Communist Party in 1932 and ceased to be a member thereof some six months before issuance of the warrant for his arrest is nevertheless subject to deportation for such past membership.

Respectfully submitted,

**WHITNEY NORTH SEYMOUR,**  
Attorney for Respondent.

C. A. STANFIELD,  
CAROL KING,  
of Counsel.

October, 1938.



**APPENDIX.**

(Act approved October 16, 1918 [40 Stat. 1012], as amended by the act approved June 5, 1920 [41 Stat. 1008].)

That the following aliens shall be excluded from admission into the United States:

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) The overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the

United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

(e) Aliens who are members of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

Sec. 2. That any alien who, at any time after entering the United States; is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States.



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OCTOBER TERM, 1938.

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EUGENE KESSLER, District Director of Immigration  
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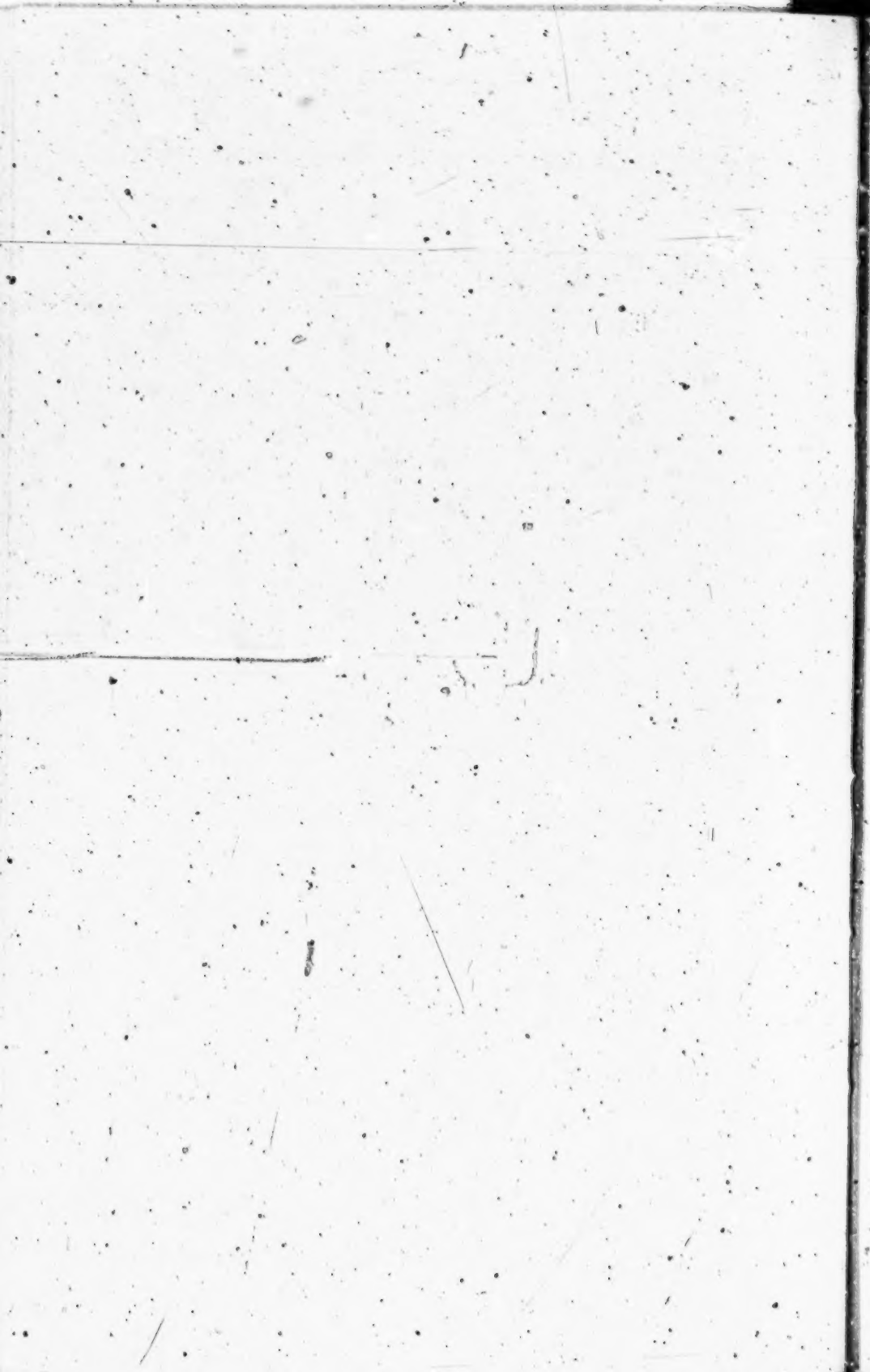
JOSEPH GEORGE STRECKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**BRIEF FOR THE RESPONDENT.**

✓ WHITNEY NORTH SEYMOUR,  
✓ C. ALPHEUS STANFIELD,  
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✓ HERBERT M. WECHSLER,  
CAROL KING,  
of Counsel.





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### ARGUMENT:

- I. There is insufficient evidence in the record to sustain the finding in the warrant of deportation that respondent after entry became a member of an organization that, within the meaning of the statute, believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States .....

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- II. Section 2 of the Act of October 16, 1918, does not authorize the deportation of an alien for membership in an organization warranting exclusion under Section 1, where his membership occurred after entry, but terminated substantially before the institution of deportation proceedings .....

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- III. The question of the sufficiency of the evidence to sustain the finding in the warrant of deportation that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States, is not before this Court. In any event, the Circuit Court of Appeals correctly held that the evidence is insufficient .....

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

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No. 330.

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EUGENE KESSLER, District Director of Immigration  
and Naturalization,

*Petitioner,*

v.

JOSEPH GEORGE STRECKER.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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**BRIEF FOR THE RESPONDENT.**

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**Opinions Below.**

The United States District Court for the Eastern District of Louisiana denied the respondent's petition for a writ of habeas corpus without opinion (R. 65). The opin-

ion of the Circuit Court of Appeals (R. 71-74) reversing the judgment of the District Court is reported in 95 F. (2d) 976. The *per curiam* opinion of the Circuit Court of Appeals amending the judgment of reversal and denying petitioner's motion for rehearing and the dissenting opinion of Judge Sibley (R. 77-78) are reported in 96 F. (2d) 1020. Petitioner's further motion to set aside the amended judgment and grant a rehearing was denied without opinion (R. 83).

### **Jurisdiction.**

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 74). An order denying a petition for rehearing (R. 74-76) was entered June 7, 1938 (R. 79), and on the same day an order was entered amending the judgment (R. 79). An order denying a second petition for rehearing and to set aside the judgment as amended, filed June 27, 1938 (R. 80-81), was entered July 27, 1938 (R. 83). The petition for writ of certiorari was filed September 7, 1938, and was granted October 17, 1938 (R. 84). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **Questions Presented.**

- (1) Whether there is sufficient evidence in the record to sustain the finding in the warrant of deportation that respondent, after entry, became a member of an organization that, within the meaning of the statute, believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States.

(2) • Whether Section 2 of the Act of October 16, 1918 authorizes the deportation of an alien for membership in an organization which would warrant exclusion under Section 1, where his membership occurred after entry, but terminated substantially before the institution of deportation proceedings.

(3) Whether the question of the sufficiency of the evidence to sustain the finding in the warrant of deportation that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States should be considered when that question was not presented by the petition for certiorari and, if it is to be considered, whether the Court below correctly held that the evidence is insufficient to sustain that finding.

### Statutes Involved.

Section 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012 (U. S. C., Title 8, Sec. 137 [g]), provides—

That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

Section 1 of the Act of October 16, 1918, *supra*, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008, 1009 (U. S. C., Title 8, Sec. 137 [c]), so far as pertinent, provides—

That the following aliens shall be excluded from admission into the United States:

- (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States \* \* \*;

Section 19 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 890 (U. S. C., Title 8, Sec. 155), provides in part:

\* \* \* In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

The relevant statutory provisions are more fully set out in Appendix A, pages 62-79, of the Government's brief.

### Statement.

The record, which contains an agreed statement (R. 4-7) and accompanying exhibits (R. 7-65) establishes the following facts:

Respondent is an alien who entered the United States legally in 1912 as an immigrant from Austria destined for the coal fields of Pennsylvania (R. 4, 31). He has resided here continuously since his entry, Hot Springs, Arkansas, having been his home for the last twenty years (R. 39). For some years prior to 1925 he worked in various restaurants as an employee and then he opened his own restaurant which he operated for over five years. Since 1930 he has "not been employed on account of poor health"

(R. 39). But in 1932 he purchased the house in which he lives (R. 40) and rents room (R. 10). He owned other property as well, including a farm, some mortgages and some stocks and bonds (R. 32, 53). He seems to have been regarded generally as a man of benevolent disposition (R. 25, 61) and his reputation in his community was good (R. 28, 48, 50, 51, 52, 58, 60, 62, 63). He became a member of the Communist Party in November, 1932, apparently paid 40 cents as membership dues and, concededly, ceased to be a member early in 1933 (R. 42, Government's brief; op. 8, Footnote 1).

In 1933 respondent filed a petition for naturalization (R. 4). On September 16, in the course of a hearing before the Acting District Director of Naturalization he stated that he had "joined the Communist Party" the previous November, under circumstances which he described (R. 42), that he had two months before the hearing bought bonds of the Soviet Union of the value of \$1,588, which "are paying interest in gold dollars American money," and that for about nine months he had been receiving "The Communist Paper known as the Daily Worker"—sent to him by a former roomer who had left owing him \$10 rent (R. 43). In conclusion, he said:

"I do not consider myself a Communist, because I am not paying dues to the Communist Party. I do not know whether we shall ever have a Communistic system in the United States. I have read Marx's books and Marx states that sooner or later there will be a Red Government in every country in the world. I am trying to protect myself, and that is why I bought the bonds of the Russian Government. I do not know what is going to happen; I do not know how long I am going to live. \* \* \* If Communism comes in this country I will not be against it, because I have got to go with the people, and whatever the people want I will have to go along with them." (R. 43-44)



Shortly thereafter respondent was taken before an Immigration Inspector in the office of the Hot Springs Chief of Police (R. 30)—apparently in the jail (R. 6-7)—and, in the presence of two local police officers was asked for a statement relative to his “right to be and remain in the United States” (R. 30). The detailed accuracy of the report of his statement (which had concededly been edited by the Immigration Officer in transcription, R. 6) was later denied by respondent who claimed that he was “excited and intimidated” (R. 10, 6). For the most part, however, he merely repeated what he had said at the naturalization hearing.

Thereafter, on November 25, 1933, a warrant of arrest issued under the hand of the Second Assistant Secretary of Labor charging that respondent is a deportable alien under the Act of October 16, 1918, as amended by the Act of June 5, 1920, for the reasons, in substance, that he believes in, advises, advocates or teaches the overthrow of the Government of the United States by force or violence, that he is a member of an organization that so believes, advises or teaches, that he is a member of an organization that distributes and has in its possession for distribution written or printed matter so advocating, and that, after his entry he has been found to have become a member of a class of aliens excluded by Section 1 of the statute, to wit, an alien who is a member of or affiliated with an organization so believing, advising or teaching (R. 7-8).

The respondent was accorded a hearing under this warrant on January 23, 1934. The record of this hearing (R. 5, 8-30) consists of the respondent's testimony, a transcript of the two statements purported to have been made by him prior to the issuance of the warrant, his membership book in the Communist Party of the United States (R. 34-38) and the testimony of two witnesses, one of them a character witness called by respondent. The Immigration Inspector concluded (R. 29-30) that the evidence sustained

the charges in the warrant of arrest and recommended deportation.

A second hearing was held in May, 1934 (R. 5, 44), before a different inspector who stated to respondent: "You are advised that the Bureau of Immigration and Naturalization of Washington has ordered that the case be re-opened for the purpose of introducing into the records of International or other authorities (*sic*) sufficient exhibits of literature of the Communist Party to show that the Party advocates the overthrow by force or violence the (*sic*) United States Government or other forms of organized government. You are advised that the Government will introduce a copy of The Communist dated April, 1934, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America." Thereupon, without authentication of any kind, seven short extracts from this magazine were offered in evidence (R. 5; 45-8). The respondent testified again at this hearing (R. 53-57) and, among other things, asserted, without contradiction, that he had never seen or heard of "The Communist" (R. 55-6). Many character witnesses also gave evidence as to respondent's good reputation in his community (R. 48-53, 57-64). The hearing concluded with the alien's declaration of his desire to remain in the United States "as this is where I made my money, where I want to spend it and where I want to die and I want no other country but the United States" (R. 64).

The order of deportation was founded on this evidence, the agreed statement explicitly reciting (R. 7) that "The Government exhibits introduced here constitute the record on which the order of deportation is based." The warrant (R. 64-65) signed by Turner W. Battle, Assistant to the Secretary of Labor, purports to be based upon "proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector" and makes the following findings with respect to respondent:

(1) "that he believes in and teaches the overthrow by force and violence of the Government of the United States";

(2) "that he is a member of an organization, association, society or group that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States";

(3) "that he is a member of an organization, association, society or group that writes, publishes and circulates written or printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States";

(4) "that after entry he became a member of one or more of the classes of aliens enumerated in Section 1 of the aforementioned Act, as amended, to wit: aliens who are members of an organization, association, society or group that believes in, advocates and teaches the overthrow by force and violence of the Government of the United States."

On June 16, 1937, respondent filed the present petition for habeas corpus alleging that the warrant of deportation is void for a number of reasons among which are that "there is no evidence in the record of the Labor Department to sustain the finding contained in the warrant of deportation," that the Department "has not correctly construed the Immigration laws and rules," that "the alien has not been accorded a fair hearing by the Labor Department" and that he "has been denied due process of law" (R. 2). The writ issued. Petitioner's answer (R. 2-4) alleged that the order of deportation was issued on the basis of "complete reports" of the two hearings which were forwarded to the Secretary of Labor, that the order

is "based upon substantial evidence taken at the hearings above referred to," and that the hearings were "in accordance with the law." The answer further alleged that respondent "is an alien who believes in, advises, advocates, and teaches, and who is a member of and affiliated with an organization that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States" (R. 3-4).

Judge Borah denied the application and remanded respondent to custody (R. 7, 65). The Circuit Court of Appeals reversed (R. 74), holding, in the language of the opinion by Judge Hutcheson: "We find nothing essentially unfair about the hearings; as deportation hearings go, they were conducted with ordinary fairness. We agree with appellant, however, that the purported finding that he believes in and teaches, and belongs to or did belong to, an organization which believes in and teaches the overthrow by force and violence of the Government of the United States, is without any support in the evidence, is a mere flating. The proceedings as a whole, and the questioning and summary in particular, are dramatic illustrations of the tyranny of labels over certain types of mind" (R. 71). Judge Holmes concurred in the result.

The order remanding the cause for further proceedings not inconsistent with the opinion (R. 74) was subsequently amended to read: "Reversed, with directions to try the issues de novo as suggested in Ex Parte Fierstein, 41 Fed. (2d) p. 54" (R. 77). Judge Sibley dissented both to the amendment of the judgment and to the denial of the Government's petition for rehearing. His opinion expressed the view that "a rehearing should be granted, especially to consider the significance of the references to the Third Communist International contained in the membership book issued to Strecker by the Communist Party of the U. S. A. and the question whether the objectives and programs of the two named organizations can be judi-

cially noticed. Neither of these things was argued before us nor considered in deciding the case, and they might lead to a different result" (R. 77).

The Government petitioned for certiorari to review the question whether "the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States," alleging that the decision on that issue below conflicted with decisions in other circuits. The Circuit Court of Appeals was said to have erred in holding that an alien is not deportable by reason of the fact that he joined the Communist Party in 1932, in holding that the evidence before the Secretary of Labor concerning the principles of the Communist Party was insufficient to sustain the order of deportation, in remanding the case for a trial *de novo* in the District Court. No other specification was included in the errors to be urged, except the general charge of error in "failing to affirm the judgment of the District Court."

In this Court, as in the courts below, the Government makes no effort to sustain the second and third findings in the warrant of deportation (*supra*, p. 8)—that respondent at the time of the proceedings brought against him was a member of an organization proscribed by the statute. The Government's brief concedes that there was no such evidence (p. 8, n. 1). It is argued however that the evidence that respondent joined the Communist Party in 1932 and was a member for several months and the evidence as to the character of that party suffice to sustain the finding that after entry respondent became a member of an organization that believes in, advocates and teaches the overthrow by force and violence of the Government of the United States, within the meaning of the statute; that the statute does not conflict with the First Amendment to the Constitution of the United States even if construed to apply to an organization which teaches violent overthrow



of the government at some remote future time; that under Section 2 of the Act of October 16, 1918, c. 186 (40 Stat. 1012, 8 U. S. C., §137 [g]) an alien is deportable even though he is not a member of a proscribed organization, if he was a member at any time after his entry. Although conceding that the point was not presented by the petition for certiorari or included in the specification of errors to be urged, the Government also contends that there was some evidence to support the finding in the deportation warrant that respondent personally believes in and teaches the forcible overthrow of the Government and that the order of deportation can be sustained on that ground. Finally, it is argued that the Court of Appeals erred in remanding the cause for trial *de novo* in the District Court.

### Summary of Argument.

#### I

The evidence in the record is insufficient to sustain the finding in the warrant of deportation that the Communist Party, during respondent's brief membership, is an organization which believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States. The evidence as to the activities of the Party shows merely that during the campaign of 1932 it urged support for Communist candidates. The documentary evidence in the record does not show advocacy of violent revolution by the Communist Party. Respondent's membership book contained the same statements which, in *Herndon v. Lowry*, 301 U. S. 242, 249-50, this Court viewed as innocent. The extracts from "The Communist" are unauthenticated and irrelevant, but even if they are considered they cannot be regarded as evidence of a policy of violence in the United States by the Communist Party.

The Court cannot properly consider documents not in

the record, referred to here for the first time by the Government. It appears affirmatively that they were not considered by the Immigration authorities. They are not properly within the field of judicial notice but, even if they could be noticed, there is much other matter which would have to be considered to determine their true meaning and significance. Review must be limited to the evidence in the record.

The finding in the warrant as to the nature of the Communist Party cannot be sustained unless based upon substantial evidence. There is no such evidence, nor does the Government seek to sustain the finding if the evidence to sustain it must be of that character.

The statute, properly construed, applies only to one who is a member of an organization advocating the use of force or violence presently or at some reasonably proximate future time and not in the hypothetical or remote future. The finding in the warrant cannot be sustained if this construction is correct. This construction is required by a consideration of its legislative history, which shows that it was aimed at threats of immediate violence, and not at dangers almost wholly imaginary. This construction should be adopted, furthermore, because a construction which would apply it to membership in an organization advocating the use of force, if at all, only in the very remote future, would raise serious questions as to its validity under the First Amendment. The assumption that friendly aliens are not entitled to the protection of the Bill of Rights is unwarranted by any decision of this Court. On the contrary, such aliens are protected by the First Amendment. The power of deportation, like other powers of Congress, is limited by the First Amendment, and a construction of the statute to permit deportation for membership in an organization not advocating the use of force immediately or in the reasonably near future, would render the statute invalid. Even were the power of deportation

not limited by the First Amendment, in construing the statute, it should be assumed that Congress did not intend to do violence to the spirit of that Amendment.

## II

Even if it be assumed, contrary to the fact, that the Communist Party was, at the time of respondent's membership, an organization advocating the overthrow of the Government by force or violence within the meaning of the statute, the statute does not authorize deportation of one who had ceased to be a member substantially before commencement of deportation proceedings. The class deportable is defined in the statute in terms which, grammatically, can apply only to present members. The view that the statute does not apply to past membership is supported by a consideration of its legislative history, and there is no contrary administrative construction. Furthermore, the nature of the process of deportation points to the inapplicability of the statute to a former member of a proscribed organization. The deportation laws are not criminal laws, but provisions for the elimination of dangerous individuals. It is not to be supposed that Congress intended to eliminate as well those who had ceased to be dangerous. Indeed, a construction of the statute to apply to those converted from membership would tend to prevent conversion and increase the danger which the statute was designed to prevent.

## III

As the question of the sufficiency of the evidence to sustain the finding in the warrant that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States, was not presented in the

petition for certiorari, it should not be considered. But if the Court considers the question, it is clear that the finding cannot be sustained. Nor would the evidence sustain a finding as to respondent's belief alone. Indeed, if the statute were construed to apply merely to respondent's personal belief, such a construction would open here the question of the validity of the statute as so construed under the First Amendment and it would be invalid.

## ARGUMENT.

### I.

There is insufficient evidence in the record to sustain the finding in the warrant of deportation that respondent after entry became a member of an organization that, within the meaning of the statute, believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States.

The fact that respondent admittedly joined the Communist Party of the United States in November, 1932 and remained a member for several months does not support the finding that he became a member of an organization "that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States." The evidence was insufficient to sustain a finding that the Communist Party is an organization of that sort.

The only evidence in the record as to the activities of the Communist Party either while respondent was a member or at any time consists of respondent's testimony that a day before the presidential election of November, 1932 it held a meeting in a Negro church in Hot Springs, which he attended and at which he joined (R. 15, 42), that he did not know it was a Communist meeting until after he went

the church (R. 14), that there were three speakers, two men and a woman (R. 12), that none of the speeches advocated the overthrow of the Government of the United States, that, on the contrary, they "advocated the organization of a Communist Party so everybody could have bread and butter," that one of the speakers, a Negro, said that the milk of a negro woman's breast was good for a white child to feed on," that he was given a handfull of circulars at the meeting (R. 13), that they contained such political exhortation as "Vote Communist on the November Plank" (R. 15), that at the meeting they "just talked about big landlords and that we had to do something about it, but didn't say anything about the overthrow of any Government," (R. 57) that other papers called upon the people to unite against capitalism (R. 33). This evidence obviously does not warrant an inference that the Communist Party is engaged in subversive activity and no such contention was made by the Government. All that is indicated is that prior to the election in November, 1932, an effort was made to enlist support for the Communist candidates at the polls.

To sustain the finding with respect to the nature of the Communist Party the Government points to statements in respondent's membership book, introduced in evidence at the first deportation hearing (R. 34-38) and in "The Communist," a magazine purporting to be published by the party, extracts from which were read into the record at the second hearing (R. 45-48). This evidence is patently sufficient; when examined objectively, it is clear that the report below was correct in concluding that it does not reflect advocacy by the Communist Party of the overthrow of the Government of the United States by force or violence. The membership book refers to the Communist Party of the U. S. A. as a "Section of the Communist International." It sets forth a series of "Extracts from the statutes of the Communist Party of the U. S. A." dealing with the



qualifications of members, the structure of the party, dues, and the importance of party regularity and discipline, none of which has the remotest bearing on the present question. The concluding paragraphs of the booklet, entitled "What is the Communist Party?" and "On Discipline," quoted in the Government's brief (pp. 35-37) do not purport to be extracts from the statutes of the Party. The reference therein contained to the competence of the Party "in virtue of its experience and authority to centralize the leadership of the proletarian struggle," the statements that the Party "incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class," and that "the Party personifies the unity of proletarian principles, of proletarian will, and of proletarian revolutionary action"—are wholly inadequate to sustain a finding that the Communist Party as an organization believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States. Precisely the same language was before this Court in *Herndon v. Lowry*, 301 U. S. 242, 249-250, and was said in the opinion by Mr. Justice Roberts to be "innocent upon its face however foolish and pernicious the aims it suggests" and a "vague declaration" amounting "merely to a statement of ultimate ideals." The Government suggests that this characterization was made "from the standpoint of the criminal insurrection statute of Georgia" (Gov't's Brief, p. 37, n. 9). That is, of course, true but, in the present context, irrelevant. The issue in the *Herndon* case was the validity under the due process clause of the Fourteenth Amendment of the Georgia insurrection statute as applied to the facts of that case, but the statement with respect to the present language was made in a general discussion of the evidence as to the allegedly criminal aims of the Communist Party. It is therefore strictly applicable to the

issue in this case. Indeed, the innocuous quality of this document is implied in the statement that the Government finds it "unnecessary to consider" whether "such phrases as 'proletarian revolutionary action' and 'revolutionary theory of Marxism' would be too equivocal in themselves to support the conclusion that the Communist Party believes in the overthrow of the Government by force and violence" because of the "additional evidence bearing on their meaning" (Gov't's Brief, p. 37).

The additional evidence in the record upon which the Government relies, does not remove their "too equivocal" character or provide an adequate basis for supporting the finding in the warrant. This evidence consists of several extracts from a magazine dated April, 1934, entitled "The Communist, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 45). There was no authentication of this document. The only testimony with respect to it was respondent's statement that he never knew such a publication existed, had never received it or seen it, knew nothing about the quotations read into the record and understood some but not others (R. 55-56). The record does not indicate the nature of the literature from which the extracts are taken—whether articles, book reviews or something else—and only in one case is the author's name cited (Exhibit D, R. 46 "By Wan Ming"). In no case is there any statement by the Communist Party that the ideas expressed are those of the Party. For all that appears they are, except for several unverified quotations, the views of the unnamed individual author, and not even his opinion of the official doctrines, if any, of the Party. The fact, if it is the fact, that the magazine is published by the Communist Party does not serve to give official sanction to everything said in every article in a particular issue. Nor is there anything in the membership book to warrant such an

interpretation. Party discipline is enjoined, it is true, but "until the Central Committee has decided them" the "discussion on basic Party questions or general Party lines can be carried on by the members" (R. 36). Insofar as this literature can be said to discuss "basic Party questions" there is nothing to indicate that they were not within the domain of open discussion. Moreover, the magazine purports to have been published in 1934 at a time when respondent concededly had ceased to be a member of the Communist Party. Even if the literature gave expression to official doctrine there is no justification in the evidence for the assumption that the doctrine prevailed during the period of respondent's membership. Internal evidence in some of the extracts shows that they related to matters which had not occurred until after his membership ceased (See *e. g.*, reference to Austrian revolt of February, 1934). There is no foundation for the suggestion in the Government's petition for certiorari (p. 15) that its assumption is warranted "since no attempt was made by respondent to show that the principles of the party had undergone any pertinent change in the interval." The burden of proof that the Communist Party falls within the statutory class was certainly on the Government and the burden of explanation could be shifted to respondent only by the introduction of evidence sufficient to warrant a finding that it was. No inference can be drawn from silence unless there is a duty to speak (Cf. *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 111-112; *Bilokumsky v. Tod*, 263 U. S. 149, 153; *U. S. ex rel. Kettunen v. Reimer*, 79 F. [2d] 315, 317 [C. C. A. 2nd]); as to this issue, respondent, who answered all the questions put to him, was under no duty to say any more. Nothing in the record would justify putting on him the burden of exegesis of a document which he had never seen or heard of before and which, in part, he did not understand (R. 56).

Even if all of these difficulties are disregarded and the extracts from "The Communist" could be imputed to the

Communist Party and related back to the period of respondent's membership, they are nevertheless inadequate to sustain the finding which the Government seeks to sustain. In all, there were seven extracts, constituting less than three pages of the Record but extracted, as the Record shows, from a publication containing approximately 100 pages. Only two of the extracts are quoted in full in the Government's brief and two in part. When all seven are examined, with proper regard for the fact that the examining officer tore these extracts from their setting, it becomes perfectly clear that they do not contain advocacy of violence in the United States at all.

In appraising such documentary evidence, as in evaluating the statements in the membership book, it would be, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States v. One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd); *United States v. Dennett*, 39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co. v. Nashville Banner Publishing Co.*, 13 F. (2d) 166, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey v. New York Society*, 234 N. Y. 1, 4; *Klaw v. New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel v. Moncure*, 58 Mont. 193, 200; *Flaks v. Clark*, 143 Md. 377, 382; *Stevens v. Storke*, 191 Cal. 329, 334; *Moore v. Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer v. United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to political tracts both American and foreign, which traditionally contain rhetoric

and overstatement that the average reader naturally discounts and usually is intended to discount. As Judge Anderson has suggested in a similar connection, "• • • it is notorious that political platforms generally adopt the language of exaggeration. Both religious and political crusaders commonly use the nomenclature of warfare. Here in the Occident, freedom, and a saving sense of humor and of proportion, have, until recently, saved us from being frightened by crusaders' rhetoric. In an Oriental missionary field, 'Onward Christian Soldiers' is said to be regarded as an alien, seditious war song, the use of which the missionaries had to abandon • • •". (*Colyer v. Skeffington*, 265 Fed. 17, 59 [D. C. Mass.], reversed, 277 Fed. 129 [C. C. A. 1st]).

The first extract quoted in full (Gov't's Brief, pp. 37-38) appears to be drawn from a critical discussion of the views of one De Leon. The statement is made that "In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the mass political strike and for an armed insurrection of the fight for power (sic), means to disarm the workers in the fact of the attack of the bourgeoisie." This hypothetical assertion of an opinion about a matter of fact was apparently made in explicating and criticizing the writings of De Leon; for the next paragraph makes the point that "in spite of his revolutionary phrases," "De Leon's conception of the proletarian revolution was the same, as far as the deception for (sic) the American proletariat goes, as that of the reformists of the Second International." The nature of the doctrine criticized remains as obscure as the criticism itself. This obscurity is enhanced rather than diminished by the quotation which follows from what is referred to as Lenin's "classical formulation about Kautsky's position on this point, which can fittingly apply to De Leon." Lenin's statement, which purports to be quoted from his *State and Revolution* (p. 20, In-



ternational Ed.), is: "The necessity of systematically fostering among the masses this and just this point of view about violent revolution lies at the root of Marx' and Engels' teachings. The neglect of such propaganda and agitation by both the present predominant social-chauvinists and Kautskyist currents being [bring?] their betrayal . . . into prominent relief." While this may be taken as a statement that some "point of view about violent revolution" is basic in the teachings of Marx and Engels, it leaves the reader completely in the dark as to what *this* point of view is. Nor is the matter clarified by the subsequent statement, not by Lenin, but by the anonymous writer in *The Communist* that the "question of a violent revolution lies at the root of Marx's teachings. Only philistines or downright opportunists can talk about revolution without violence." Whatever the merit of these observations, in the unrevealed context of ideological controversy in which they appear to have been made, they cannot be deemed to disclose the position of the Communist Party. The Government argues that the foregoing extract "contains an interpretation of the 'revolutionary theory of Marxism' [the phrase used in the membership book] which expressly repudiates the notion that it is compatible with peaceful and orderly change" (Gov't's Brief, p. 37). Where the alleged explanation of the commentator is, as here, at least as obscure as the matter to be clarified, it can hardly be thus contended that, together, they shed light.

The second quotation in the Government's brief (p. 38) is a portion of an extract from *The Communist* which purports to be a quotation from the Program of The Communist International to the effect that "The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor everyday needs as a starting point from which to lead the working class to the revolutionary struggle for power." The

full text of the extract in the record (R. 47) from which this passage is taken provides slight indication as to the context in which the quotation is made. The extract begins: "Such a formulation of the question is certainly not Marxian"—without indicating what the question or the formulation thus characterized are. It continues: "To confine the work of the Party to the propagation of the final overthrow of capitalism, without mobilizing the workers for struggle against capitalism, is nothing less than the betrayal of the working class to the bourgeoisie. The task of the revolutionary party of the working class is to defend the every day interests of the working class, but to do so in such a way that the workers will understand from their own experience, that only with the overthrow of capitalism and the establishment of the rule of the working class will their interests be finally secured." The extract is completed by the quotation set forth above and emphasized in the Government's brief.

To interpret this extract as an expression of belief in or advocacy of the violent overthrow of the Government of the United States is to give to words a meaning which they cannot, on any reasonable interpretation, bear. On the contrary, if the language may be read to refer to political activity in the United States at all—the most that can be said is that it teaches a patient devotion to the cause of the workers so that they may understand from their own experience that under capitalism their interests cannot finally be secured. The references to "the struggle against capitalism", to "the overthrow of capitalism" and the "revolutionary struggle for power" do not imply the use of force any more than do analogous phrases in the membership book, and do not advert to the Government of the United States.

The third extract quoted by the Government (pp. 39-40) Exhibit E (R. 46-47) is an anonymous statement followed by a reference, apparently by way of citation to "Stalin, 'The October Revolution and the Tactics of the Bolsheviks,'

Leninism, International Publishers, Vol. I, pp. 215, 216." It reads as follows:

"It is more than likely that in the course of the development of the world revolution, there will come into existence—side by side with the foci of imperialism in the various capitalist lands and with the system of these lands throughout the world—foci of socialism in various Soviet countries, and a system of foci throughout the world. As the outcome of this development, there will ensue a struggle between the rival systems, and its history will be the history of the world revolution. The world-wide significance of the October revolution lies not only in the fact that it was the first step taken by any country whatsoever to shatter imperialism, that it brought into being the first little island of socialism in the ocean of imperialism, but likewise in the fact that the October revolution is the first stage in the world revolution and has set up a powerful base whence the world revolution can continue to develop."

Insofar as this passage appearing in the record, without any indication of its context, is meaningful at all, it is obviously nothing but a prophecy of the future trend of events in some unidentified part of the world, written with particular reference to the effect thereon of the Russian revolution. If the citation at the end is to be taken as a clue to the context, it seems quite clear that the statement was made in the course of an historical analysis of the October revolution in Russia. It has no bearing upon the program of the Communist Party or the attitude of that party with respect to the Government of the United States.

The fourth extract quoted by the Government's Brief (p. 40 from Exhibit C, R. 46) is preceded by the following paragraph which is not quoted in the Brief: "The call for help of the Central Executive Committee of the Chinese Soviet Republic must not remain without a wide echo, which should be translated into acts." As this paragraph indicates the entire passage deals with China. At the most, it suggests that the Communist Parties should attempt to

induce the workers to refuse to transport munitions intended for use against the Chinese Soviet Republic and should organize "actions" "directed against the intervention of American, European and Asiatic imperialists."\* This (with the one in the margin), indeed, is the only reference to America contained in the extracts from *The Communist* appearing in the record. We think it too plain for argument that to urge that the workers refuse to transport munitions to China in the interests of imperialists is not to urge or to believe in the violent or forcible overthrow of the Government of the United States.\*\*

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\*In a footnote to the Government's Brief (p. 40, n. 11) it is stated that a part of this extract is taken from the fourteenth condition of admission into the Communist International and that it is so stated at page 392 of *The Communist*, the same page from which the extract was read. As this statement does not appear in the record, it is not properly before this Court. See pages 32-9 *infra*. It is further stated by the Government that there were 21 such conditions formulated and adopted by the Second World Congress of the Communist International in 1920 and that these were enforced while respondent was a member of the Communist Party of the United States. There is no evidence in the record with respect to either of these propositions and neither of them may be judicially noticed. See p. 33, *infra*.

\*\*Exhibit D (R. 46) not quoted in the Government Brief also deals with China, apparently in the same article, and suggests that there is something exceptional about the Chinese situation under discussion. It reads: "The first and most important difference is that the plan of the campaign, the intervention of the International Imperialists (America, Japan, England, France, Germany and others) against the Chinese Soviet Republic has been worked out with greater frankness, more nakedly, with greater energy and solidarity. All the other differences result from this most important one." It is needless to add that this statement is no more susceptible of construction as the expression of belief in or advocacy of the overthrow of the United States Government by force or violence than the paragraph discussed in the text.

The two remaining extracts from *The Communist* appearing in the record are not discussed in the Government's Brief. They have, however, an interesting bearing on the contention that the documentary evidence establishes that the Communist Party believes in and seeks the forcible overthrow of the United States Government.\*

\*The first of these (Exhibit A, R. 45) is as follows: "The Austrian revolt bore out the correctness of the prediction made by Comrade Stalin, in his report to the Seventeenth Congress of the Communist Party of the Soviet Union. On the 26th day of January, seventeen days before the Austrian revolt, Comrade Stalin had declared: 'But if the bourgeoisie chooses the path of war, then the working class in the capitalist countries who have been reduced to despair by four years of crisis and unemployment takes the path of revolution. That means that a revolutionary crisis is maturing and will continue to mature. And the more the bourgeoisie becomes entangled in its war combinations, the more frequently it resorts to terroristic methods in the struggle against the working class and the toiling peasantry, the sooner will the revolutionary crisis mature.' The Austrian workers took the path of revolution—and their guns dealt death to Austro-Marxism."

The second extract (Exhibit B, R. 45-46) is as follows: "How aptly the theory of Austro-Marxism matches its practice! Recently the leader of Austrian social-democracy, Otto Bauer, declared: 'In Austria, more than in almost any other country, there is the prospect that State power will be won by the working class along the road of democracy. If but the proletariat here will understand merely how to make use of their legal opportunities, then very soon the bourgeoisie will begin to shout, as Odilon Barrot did in 1849: "La legalite nous tue!" (Legality is killing us!) If at the same time our soldiers, our gendarmes, our schutzbund is defending republican legislation, then the bourgeoisie will be unable to smash this legislation, since the legal measures of the election address place the legal powers in our hands!' Very true, Herr Bauer, legality has killed us! But it is not Odilon Barrott, nor Englebert

(Footnote continued on next page.)



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Both of these passages deal with Austria. The first sees in the Austrian revolt the fulfillment of a prediction by Stalin that the more frequently the bourgeoisie "resorts to terroristic methods in the struggle against the working class and the toiling peasantry, the sooner will the revolutionary crisis mature." Such a prediction may be accurate or inaccurate and one may be correct or incorrect in regarding the Austrian workers' revolt as evidence of its accuracy. But what is more significant for the present purposes is that, as the second extract makes clear, the Austrian workers' revolt is referred to as a revolt against a fascist regime occurring after the destruction of republican government and of the workers' political rights. The reference "to the call of the Communist Party for the general strike" is to a strike against "the fascist offensive." The "revolutionary crisis" matures because of terroristic methods

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*(Footnote continued from previous page.)*

Dollfuss—but the workers of Austria who cry out these words! They whom you subjected for decades to the use of their "legal opportunities"; whom you allowed to be systematically disarmed, lest they use their extra-legal opportunities; whom, by your own confession, you held back in March of last year from responding to the call of the Communist Party for the general strike that would have broken the fascist offensive; whom you betrayed by your advocacy of the use of "legal opportunities" of accepting fascist decree after decree. They whom you urged to retreat before the government's attacks upon their living conditions, whom you instructed to offer no resistance to the destruction of their political rights;—they whom you taught to defend bourgeois republican legislation, the Schutzbund, whose dissolution you permitted without a summons to resistance as a stoic exercise in the use of the legal "opportunities" of obedience to fascism; they whom you tried to chain to the United front with fascism in the black shirt under the pretense of fighting fascism in the brown shirt—it is they who cry "Legality has killed us!" The workers of Austria cry out these words."

directed against the workers by the bourgeoisie. When read along with these passages, we submit that if the extracts in the record could be accepted as official explanations of the "revolutionary theories of Marxism" and the Communist program, which we deny for reasons stated above, they would indicate no more than a prediction that democratic processes would, in the course of time, be subverted by a capitalistic revolution against republican forms, as they were in Austria, and that the workers should be prepared, if that moment arrives, to meet the force of the usurper with force. The evidence is insufficient to sustain a finding that the Communist Party holds this view with respect to the United States but even were the evidence sufficient it would not bring the Party within the statutory class. The "government of the United States" referred to in the statute must be taken to be a government established in accordance with the Constitution of the United States, not a government established by a coup d'état. The statute is directed at advocacy of forcible and violent revolution against the lawful government, not at advocacy of counter-revolution against an usurper, occurring after the present government has already been overthrown, advocacy of which would necessarily be entirely hypothetical.

To buttress the documentary evidence above described, the Government points (Brief, p. 42) to respondent's testimony at a preliminary examination before an Immigrant inspector (R. 32-33). Respondent stated, according to the record, that he was familiar "with the intents and purposes" of the Communist Party at the time he joined, that he had acquired such knowledge from study for about ten years of the writings of Marx, that he was "in accord with Marx in regard to the social order of things", that the Party "proposes to destroy capitalism and establish a Government by the people", a government "similar to that now in existence in Russia". Thereafter the following colloquy appears:

Q. What means will the Communist Party of America use to attain its purpose?

A. I do not know what will be necessary.

Q. Will it resort to armed force in the event that should be necessary?

A. That is what they say.

Q. Who says that?

A. The leaders of Communism.

Q. Do you mean the local leaders, the national leaders, or those in Russia?

A. All of them.

Q. Do you think that the present form of Government in the United States should be destroyed and a Communistic or Russian form of Government established in the United States?

A. I think that the destruction of capitalism is inevitable and that the sooner it comes the better off we shall all be.

Q. Would you personally bear arms against the present U. S. Government?

A. Not at this time.

Q. Why not at this time?

A. Because Communism is not strong enough now.

Q. Supposing that the majority of the populace of the United States were Communists, and were certain of a victory over capitalism in an armed conflict, would you then personally bear arms against the present Government?

A. Certainly; I would be a fool to get myself killed fighting for Capitalism."

When the record of this preliminary hearing was offered in evidence at the first hearing on the warrant of deportation, respondent testified that the "answers as transcribed were not as given by me" and that he was "excited and intimidated" (R. 10, 6). The immigration officer who

transcribed the proceedings admitted that the report was not *verbatim*, that he might have edited it " . . . to correct the grammar, transposition or something of that sort . . . " (R. 6). It is a striking fact that neither at the naturalization hearing which preceded nor at the two deportation hearings which followed is there any indication that respondent understood the Communist program to envisage the use of force at any time; his testimony is inconsistent with such a view. But even if respondent made the statement attributed to him at the preliminary hearing, that the leaders of Communism "say" that they will "resort to armed force in the event that should be necessary", the statement is patently ambiguous and wholly insufficient to sustain the finding. There is no indication as to whom the "force" referred to will be directed against or what the notion of "necessity" involves, especially in view of the accompanying statement that the "destruction of capitalism is inevitable and the sooner it comes the better off we shall all be". It was apparently to remedy this latter defect that the examiner put the hypothetical case of a majority of the people Communists and certain of a victory over capitalism. Respondent's answer that "I would be a fool to get myself killed fighting for Capitalism", even if it represented Communist doctrine, instead of a mere indication of a strong instinct of self-preservation, hardly warrants the inference that the reference to the use of armed force, if necessary, disclosed a Party purpose to overthrow the Government of the United States. That portion of the proceedings was aptly characterized by the Court below as a foolish answer to a foolish question, "according to its folly" (R. 73).

Viewing the evidence in the record, as a whole, it is clearly insufficient to sustain the finding that the Communist Party believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States. The literature read in evidence,



consisting as it does for the most part of "poor and puny anonymities" containing theoretical discussion in which no reference is made to the Government of the United States (Holmes, J., dissenting in *Abrams v. United States*, 250 U. S. 616, 629) suffices to establish no more than that the epithet "revolutionary" is applied in various contexts to Communist ideas, which admittedly call for a profound transformation in the structure of society and a shift in the locus of political power. Ideas far less transforming, changes far less profound have been labelled "revolutionary", without implying that they contemplated or involved the use of force against established Government.

As a distinguished judge has said, "Opponents of changes in Government generally describe those changes as 'revolutionary'—as involving 'a destruction of our ancestral liberties'. The Thirteenth, Fourteenth, Sixteenth and now the Eighteenth Amendments have all been denounced as revolutionary. It is a question of degree and of the point of view. But our Government is not yet overthrown. Institutions grounded on liberty and justice under law are too well-rooted to warrant us in being terrorized by criticisms and mooted changes". Anderson, J., in *Colyer v. Skeffington*, *supra*.

In the effort to strengthen the paltry evidence in the record, the Government quotes two passages from a document entitled "Program of the Communist International", published by Workers Publishing Co., Inc. (N. Y. 2d ed. 1933) pp. 36-37, which is said to be an "official" English text" of the "Program, which was adopted on September 1, 1928, at the Sixth World Congress of the Communist International held at Moscow". Further extracts from this document are set forth in an appendix to the Government's Brief (pp. 80-92) along with another document (Appendix C, pp. 93-100) said to be "The Twenty-one Condi-

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\*Nothing in this pamphlet states that the text is "official".

tions of 'Admission into the Communist International', adopted at the Second Congress of the Communist International held in Moscow, July 17 to August 7, 1920, published by Workers Library Publishers, Inc. (N. Y. 1934). At another point in the Brief, this second document is said to represent conditions which "were in force while respondent was a member of the Communist Party of The United States" (p. 40, n. 11) but there is no evidence to that effect.

Neither these documents nor any language contained in them may be now invoked to sustain the finding in the warrant of deportation.

First: The agreed statement of facts explicitly states (R. 7): "The Government exhibits introduced here constitute the record on which the order of deportation is based". Neither of the documents referred to is included in the record. The Government does not contend that notice was taken of these documents in the administrative proceeding, and under the terms of the stipulation it must be assumed that they were not considered in reaching the administrative finding contained in the warrant. Indeed, if they were considered, the finding would be defective because of the absence of a full record containing all the evidence on which it is based. *Kwock Jan Fat v. White*, 253 U. S. 454; *Tod v. Waldman*, 266 U. S. 113, 119; *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 319, 339. Nor can the administrative action be sustained on the theory that the administrative tribunal had taken judicial notice of the existence and contents of the documents. Quite apart from the question whether the existence and contents of the documents is within the range of judicial notice, it is well settled that an administrative finding which can only be made after a hearing cannot be sustained upon the basis of facts or documents known to the administrative tribunal if the supposed facts or the evidence from which they are

inferred is not disclosed in the administrative record. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 300-306; *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 227 U. S. 88, 93-94; *U. S. v. Abilene & Southern Railway Company*, 265 U. S. 274, 288. Since these documents were not and could not have been considered by the administrative tribunal, they are unavailable in a judicial proceeding, the purpose of which, as this Court has frequently said (*Tang Tun v. Edsell*, 223 U. S. 673, 681-682; *Zakonaite v. Wolf*, 226 U. S. 212, 274-5; *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106; *Lloyd Sabando Societa v. Elting*, *supra*, 335-6) is to review the sufficiency of the evidence upon which the administrative finding was based. Compare *Gegiow v. Uhl*, 239 U. S. 3, 9. Such indeed, is a necessary corollary of the Government's argument here in objecting to the amendment of the judgment in the Court below to order a *trial de novo* in the District Court (Government's Brief, pp. 55-61). If, as is contended, it would be error for the District Court to take additional evidence on the questions administratively determined, because it would have undesirable consequences from an administrative viewpoint, it would obviously be far more serious error, affecting interests more important than administrative convenience, to permit an administrative finding on insufficient evidence to be supported by reference to extrinsic documents without their introduction into evidence at all, and without proper opportunity for objection, examination and rebuttal. See *Ohio Bell Telephone Company v. Public Utilities Commission*, *supra*.

Second: The Government does not make explicit the theory upon which it contends that this Court may consider the additional documents set forth in the brief in determining the sufficiency of the evidence to support the finding contained in the warrant. It is obvious, however, that

the documents are relevant only if their contents actually represent the principles of the Communist International at particular times germane here. There is no evidence to that effect and this Court may not take judicial notice that such is the fact. Courts may only take judicial notice of matters of common knowledge. *Ohio Bell Telephone Company v. Public Utilities Commission*, *supra*, at p. 301. While it may, perhaps, be common knowledge that the Communist International issued a set of conditions of admission in 1920 and a Program in 1928, it is not a matter of common knowledge that the documents now referred to by the Government for the first time are the documents issued by that organization. Moreover, even if the authenticity of these documents is to be assumed, this Court cannot judicially notice that the language contained in the documents embodies the actual principles and Program of the Communist International at a time which is relevant in the present case. Indeed, if there is any relevant fact within the range of judicial notice, it is that there has been much debate as to what the Program of the Communist International means and the extent to which it is accurately set forth in the published Program. See e. g. Florinsky—*World Revolution and the U. S. S. R.* (MacMillan, 1933) especially pages 178; 193, 216, 221, 222, 245, 248, cited Gov. Br. p. 43; Trotsky—*The Third International After Lenin* (Pioneer Publishers, New York 1936); Browder, *The People's Front* (International Publishers, 1938); Strachey, *The Coming Struggle For Power* (Modern Library ed., 1935) Intro. vii-xx ["The Question of Force and Violence"]. This Court cannot consider the documents cited by the Government as bearing upon this question unless it is also prepared to take notice of other books and documents which bear upon the truth of the contention which the Government seeks to maintain. Indeed, if judicial notice were to be taken of this language on the theory that it is contained in historical documents, there is much in the literature

and in the history of Communism as an intellectual and political movement in the Western World that would have to be noticed in determining whether the language is to be interpreted literally, as the Government argues, rather than symbolically or rhetorically. The complexity of the subject which would thus be drawn into the domain of judicial notice is well indicated by Mr. Justice Evatt of the High Court of Australia, in an opinion in *The King v. Hush*; ex parte Devanny, (1932), 48 C. L. R. 487, 516-518, set forth below:

"There is much in the matters averred and printed to suggest that the Communist Party advocates that the whole Parliamentary machine must be completely changed—transformed—revolutionized, in order that a monopoly of political power shall be given to the working class, and that owners of private industries, property and wealth shall be dispossessed without compensation; further, that it is highly probable that so great a change, whether or not it is approved by the majority or ordained by law, will not be acquiesced in without resort to force on the part of those dispossessed, that, in this sense, a violent civil upheaval will, almost certainly, accompany the proposed transformation of society and that actual civil violence and disturbance will accompany the attempted socialization of industry.

"In order to determine the bearing of all these matters, reference would have to be made to the leading exponents of more modern Socialist thought, from Marx and Engels onwards. It is a subject upon which every student of history, political science, sociology and philosophy should be tolerably well informed. Even the averments in the present case include a historical reference to the three Internationals. In the ultimate ideal of a classless society, the Communist movement



has much in common with the Socialist and working-class movement throughout the world. They all profess to welcome a revolutionary change from the present economic system, which, conveniently enough, is called Capitalism, and the more violent protagonists of which are now called Fascists. The doctrine of the class struggle raises a dispute as to fact, rather than opinion. It is not a question whether it is desirable to have a struggle between a property-less class and a property-owning class, but whether such struggle exists in fact. The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship, there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that a violent upheaval will ensue when the time comes to effect such substitution (*Encyclopedia Britannica*, 12th ed., vol. 30, p. 732 (R. P. Dutt); cf. *Laski's Democracy in Crisis* pp. 194, 226, 227, 241.)

“‘When the time comes.’ It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. ‘The inevitability of gradualness’ as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and the

threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability".

The portion of the article in the Encyclopedia Britannica, 12th ed., vol. 30, p. 732, referred to in the foregoing excerpt from the opinion of Justice Evatt reads as follows:

"Communism and Democracy. It is from this point of view that the controversy of communism and democracy should be approached if the communist position is to be understood. The communists do not reject the current conceptions of democracy because they believe in the superiority of the few, but because they believe that the phrases of democracy bear no relation to present realities. The divorce between the realities of power and the theory in modern democratic states has been noted by observers of all schools; it is the special point of the communist to insist that this divorce is not due to accidental and remediable causes, but is inherent in the nature of capitalist democracy. Democracy, in fact, is held to be unrealizable in capitalist society because of the fundamental helplessness of the propertyless man; the parliamentary forms only serve to veil the reality of the 'bourgeois dictatorship' by an appearance of popular consent which is rendered unreal by the capitalist control of the social structure; and even this veil is cast aside in moments of any stress by the open assumption of emergency dictatorial powers. The plea that this situation may be remedied by education and propaganda is met by the reply that all the large-scale

organs of education and propaganda are under capitalist control.

"On the other hand, communism, while rejecting current democracy, differs from syndicalism and other revolutionary philosophies which proclaim the right of the 'militant minority' to endeavor to change society. The glorification of the minority and of the *coup d'état* really belongs to the Blanquist school, which was always vigorously opposed by Marxism. Marxism taught that the liberation of the workers could only be the act of the workers themselves, and that all the communists could do was to endeavor to guide the struggle of the workers into its realization in the dictatorship of the proletariat. In this way the Bolsheviks did not carry through their revolution of Nov., 1917 until they had gained the majority in the Soviets and the trade unions. Where the communists differ from other believers in the ultimate victory of the working class is that they do not believe that victory will be achieved until after a very much more severe struggle than is ordinarily contemplated. They believe that the ruling class will use every means, political, economic, and military, to defend its privileges, and that the final decision will not be reached without open civil war. In support of this they quote evidence to show the readiness of the ruling class in many countries to fling constitutional considerations to the winds when their privileges are in danger. To mistake dislike of this prospect for evidence of its improbability they regard as a fatal policy, and they believe it necessary, therefore, to make preparations for the event, considering the best guarantee against the chaos of prolonged social disorder (otherwise inevitable in the period of capitalist dissolution) to be the existence of a powerful revolutionary party. It is this aspect of communism which has led to the cur-

rent distinction between communism and other forms of socialism as a difference in method: but it will be seen that this difference of method arises from a far more fundamental divergence in outlook and in philosophy. The methods of the communists are not comprehensible save in relation to the whole philosophy of *The Communist Manifesto*."

These complexities suffice to indicate that judicial notice may not be employed to bring into the consideration of the present case the documents cited in the Government's brief. This Court has recently reaffirmed the rule that if matters are disputable they are not within the realm of judicial notice which merely serves, in any event, to place upon the opposing party the burden of disproving the fact judicially noticed. *Ohio Bell Telephone Company v. Public Utilities Commission*, *supra*.

In none of the cases in which this Court has had occasion to pass upon the sufficiency of the evidence that particular organizations advocate illegal doctrines has it been suggested either that the principles of the organization themselves or that documents evidencing those principles are within the scope of judicial notice. See e. g. *Herndon v. Lowry*, 301 U. S. 242; *Fiske v. Kansas*, 274 U. S. 380; *Whitney v. California*, 274 U. S. 357; *Gillow v. New York*, 268 U. S. 652. See also *ex parte Fierstein*, 41 F. (2nd) 53 (C. C. A. 9th). In all, the question has properly been regarded as one to be determined on the basis of the evidence in the record, and upon the basis of that evidence, convictions have been both reversed and affirmed. Indeed, in *Fiske v. Kansas*, *supra*, a conviction was reversed although the organization involved was the same as that considered in *Burns v. United States*, 274 U. S. 328, decided the same day, on which the conviction was affirmed.

The Government does not argue in the present case that either the administrative tribunal or the Court may

take judicial notice of the principles or policies of the Communist Party as such. For precisely the same reason that such a contention could not be sustained, namely, that the question is disputable, there is no justification for resorting to documents extrinsic to the record to supplement the evidence which the record contains.

That the question whether the Communist Party believes in or advocates the forcible overthrow of the Government is one to be determined by proof in the normal course has been recognized impliedly, if not expressly, by the Committees on Immigration of both the Senate and the House of Representatives in reports recommending additional legislation including Communists by name in the statutory list of excluded classes. H. R. Rep. 71st Congress Third Session, No. 2797 (by Mr. Cable); H. R. Rep. 72nd Congress First Session, No. 1353 (by Mr. Dies); Senate Rep. 72nd Congress First Session, No. 808 (by Mr. Patterson and Mr. Hatfield); H. R. Rep. 74th Congress First Session, No. 1023 (by Mr. Starnes). In the last three of these reports reference is made to the "fact that the law does not now make an alien Communist as such subject to exclusion and expulsion." It is not without significance that the recommended legislation has not become law.

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The Government argues that the statute applies to membership in an organization that believes in, advises, teaches or advocates the overthrow of the United States Government by force at any time no matter how hypothetical or remote. Assuming this interpretation of the statute, and conceding that "much of the language used is susceptible of an interpretation more rhetorical than literal" (Government's Brief, page 46), it urges that nevertheless "when the evidence before the Secretary is considered as a whole, whether or not supplemented by these additional portions



of the Program", it cannot "fairly be said that within the test laid down by this Court in the *Vajtauer* case . . . there was not evidence to support the finding in the deportation warrant" (Government's Brief, page 48). The emphasis put upon the statement in the opinion in the *Vajtauer* case (273 U. S. 103, 106) that "upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was *some* evidence from which the conclusion of the administrative tribunal could be deduced" (Government's Brief, pages 15-16) is instinct with the intimation that the scope of judicial review in this proceeding is exceptionally narrow and that, were the scope of review somewhat broader, the finding could not be sustained. It is clear, however, that if by "*some* evidence" the Government means to suggest that the finding can be sustained although the evidence was *unsubstantial*, the suggestion is wholly without foundation.

The statute provides that "the decision of the Secretary of Labor shall be final" and this has been interpreted to mean final on questions of fact but not of law. *Gegiow v. Uhl*, 239 U. S. 3, 9; see also *Kwock Jan Fat v. White*, 253 U. S. 454, 457-8; *Japanese Immigrant Case*, 189 U. S. 86, 100, 101; *Zakonaite v. Wolf*, 226 U. S. 272, 274-5; *United States ex rel Bilokumsky v. Tod*, 263 U. S. 149. It may indeed be questioned whether the statute has any application in a *deportation* case where, as here, the findings are made and the warrant signed not by the Secretary but by an assistant.\* Compare *Morgan v. United States*, 298 U. S. 468. But even if the statute applies it is well settled

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\*It is significant that in the case of exclusion the statute provides that the finding of the Board of Special Inquiry shall be final unless reversed on appeal by the Secretary of Labor [8 U. S. C. §153] whereas in the case of deportation, Section 19 of the Act of 1917 [8 U. S. C. §155] provides only that "the decision of the Secretary of Labor shall be final."

that an administrative finding which is unsupported by substantial evidence on a material question of fact is contrary to law. As this Court observed in an opinion by the Chief Justice in *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 277, a "finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority".

In many opinions dealing with the scope of judicial review of administrative findings the words "some evidence" and "substantial evidence" are used interchangeably. See e. g. *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 227 U. S. 88, 90-91, 94, 98, 100; in no case has it been suggested that unsubstantial evidence would suffice. On the contrary, this Court has held at this Term that the provision of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence shall be conclusive" "means supported by substantial evidence" and a different formulation of the test by the Circuit Court of Appeals was held to refer to substantial evidence. *Consolidated Edison Co. v. National Labor Relations Board*, U. S. , 59 Sup. Ct. 206, 217-7. See also *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 146-7. The same result has been reached with uniformity in other fields of administrative law. See e. g. *Helvering v. Rankin*, 295 U. S. 123, 131; *St. Joseph's Stockyards Co. v. United States*, 298 U. S. 38, 73, 75 (concurring opinion by Brandeis); *Interstate Commerce Commission v. Louisville & Nashville Railroad*, *supra*; *Interstate Commerce Commission v. Northern Pacific Railway*, 216 U. S. 538, 543-4. As the Circuit Court of Appeals in the Sixth Circuit has

aptly said: "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power". *National Labor Relations Board v. Thompson Products, Inc.*, 97 F. (2nd) 13, 15. Substantial evidence was defined in the *Consolidated Edison* case, *supra*, as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

The rule of substantial evidence was articulated in a deportation case involving a similar question many years ago by the First Circuit Court of Appeals (*Skeffington v. Katzeff*, 277 Fed. 129) and by the Circuit Court of Appeals for the Fifth Circuit (*Lisotta v. United States*, 3 F. [2d] 108, 111). We submit that there is nothing in the decisions in *Vajtauer v. Commissioner of Immigration*, *supra*, or *Tisi v. Tod*, 264 U. S. 131, 133 to justify the conclusion that a less rigorous standard of sufficiency is applicable here. In both of those cases only constitutional questions were presented. The aliens contended that because of the insufficiency of the evidence the order of deportation constituted a denial of due process of law. It was in that connection that this Court stated that the order would be sustained if the finding upon which it rested was supported by "some" or "any" evidence. In view of the character of the evidence and the extent of its consideration by this Court as well as for the other reasons stated above, we submit that this formulation was not intended to refer to evidence which is "unsubstantial" in the sense in which that word is used in other decisions of this Court. But even if the choice of words was intended to point to a distinction in the nature of the governing test, the distinction would have no application here. The petition for habeas corpus alleged that the warrant was void not only because the respondent "has been denied due process of law" but also because the "Labor Department has not correctly construed the Immigration Laws" and because

there is "no evidence in the record of the Labor Department to sustain the finding contained in the warrant of deportation". (R. 2) The statute defining the jurisdiction of Federal Courts to issue the writ of habeas corpus provides that the writ may be issued if the petitioner "is in custody in violation of the Constitution or of a law or treaty of the United States". (R. S., Sec. 753, 28 U. S. C. A., Sec. 453, italics ours) If the finding was not supported by substantial evidence, the order of deportation violates the Immigration Law under the authorities cited above even if it does not violate the guarantee in the Fifth Amendment of due process of law.

Nowhere in the Government's Brief is it contended that there is *substantial* evidence to support a finding that the Communist Party of the United States was, during the few months of respondent's membership in 1932 and 1933, an organization that believes in, advises, advocates or teaches the overthrow of the Government of the United States by force and violence at any time, however remote in the future. For the reasons previously stated, we submit that there was no such evidence and, indeed, that even if the test of sufficiency is properly formulated without the qualification of substantiality, the Circuit Court of Appeals properly decided for reasons set forth in its opinion (R. 71) that the finding cannot be sustained.

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The Government's argument with respect to the sufficiency of the evidence to sustain the finding is based upon the premise that the statutory reference to an organization "that believes in, advises, advocates or teaches . . . the overthrow by force or violence of the Government of the United States" applies even though the belief or advocacy relates to the use of force "at any time in the indefinite future". (Government's Brief, p. 19) If the premise is

unsound and the statute properly construed refers to the use of force immediately or at some reasonably proximate future time, no effort is made to sustain the finding. We submit that the premise is unsound and that the statute has "no application to an organization which speaks of the use of force, if at all, only hypothetically and in the utterly remote, distant future. Accordingly even if the Government's view of the evidence in the present case is accepted the Court below properly held that the finding cannot be sustained.

First: As the Circuit Court of Appeals pointed out in the opinion below the "statute under which these proceedings were instituted was enacted in 1918 and amended in 1920 to meet a situation caused by the crisis in Russia in 1918, and 1919, and the propaganda following that crisis for the overthrow of governments by force. It was enacted to enable the United States to expel from its shores aliens seeking a footing here, to propagandize and proselytize for direct and violent action". (R. 73) The amendment of 1920, following the ruling of the Labor Department that the I. W. W. was not shown to be included within the class of organizations specified in the 1918 Act, was said in the Reports of the House and Senate Committees on Immigration and Naturalization to be intended to facilitate the deportation of "aliens actively at work for the destruction of this Government". H. R. Rep. 66th Congress Second Session, No. 504, p. 7; Senate Rep. 66th Congress Second Session, No. 648, p. 4. Nothing in the legislative history of earlier statutes suggests that the problem to which Congressional action was addressed was responsibly defined in any less immediate terms. The scanty reference to "philosophical anarchists" in an opinion of this Court interpreting the Exclusion Act of 1903, *Turner v. Williams*, 194 U. S. 279, 292-4, does not warrant the conclusion that the legislation in question here was



directed towards hypothetical problems that the indeterminate future might bring forth. Indeed, prior to the Act of 1918, Congressional attention was concerned primarily with matters relating to exclusion rather than deportation. (See e. g. H. R. Rep. 64th Congress First Session, No. 95; Veto Message of President Wilson, H. Doc. 1527, 63rd Congress 3rd Session.). As Judge Anderson observed in *Colyer v. Skeffington*, *supra*, " 'overthrow' is a very large word"; so, too, are "force" and "violence" and "the Government of the United States". In the absence of evidence that Congress was fearful of possible danger so remote as to be almost chimerical, it is hardly to be supposed that it was concerned with aliens whose belief in the necessity or propriety of force envisages some remote time when they anticipate that our society, following what they believe to be a historic cycle of societies in general, will be very different than it is or than it was when this legislation was enacted.\* It is reasonable to

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\*The Act of October 16, 1918 [40 Stat. 1012] was enacted during the World War and was urged upon Congress by the War and Navy Departments as an urgent measure (56 Cong. Rec., pt. 8, p. 8109, 65th Cong., 2nd Sess.). Attached to and made a part of House Report No. 645 [65th Cong., 2nd Sess.], accompanying H. R. 12402 which became the Act of Oct. 16, 1918, is a letter from the Secretary of Labor to the Chairman of the Committee on Immigration in which the former declared: "Of course the entry of the United States into the war has created or emphasized problems in connection with these classes which were not anticipated and which probably would not have arisen or become prominent in times of peace." The report itself spoke of certain aliens, "implacable and seditious enemies of our Government, especially since war was declared", to reach whom was one of the main purposes of the bill. The amending Act of June 5, 1920 [41 Stat. 1008] was enacted in the post-war period of "social upheavals abroad, and world-wide uneasiness. That Congress believed that it was dealing with an

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suppose that the statute which applies to all aliens without discrimination, however long their residence in the United States, was directed towards present evils with which the Congress might reasonably be concerned.

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immediate and urgent situation, and not with an abstract problem, is apparent from the committee report and the debates in Congress. House Report 504, p. 7 [66th Cong., 2nd Sess.], accompanying H. R. 11224 which became the Act of June 5, 1920, which complained that "as the decisions of that department [i. e. Labor] above quoted have resulted in failure to deport aliens *actively at work for the destruction of this Government*, the necessity for the amendment becomes not only apparent but *urgent*." The entire atmosphere of the proceedings on the floor of Congress concerning the necessity of the legislation was that of deep concern with an evil considered both immediate and urgent [59 Cong. Rec., pt. 1, pp. 978-1003, 66th Cong., 2nd Sess.]. The debate was opened by Mr. Campbell, of the Committee on Rules reporting the bill, with a speech denouncing "a disposition and purpose upon the part of a lawless minority to override written constitutions and laws and to accomplish their purposes by direct action" [p. 979]. Mr. Welty, of the Committee on Immigration sponsoring the bill, after having declared that: "There are those who think that the country is unduly alarmed; that there is no danger from the anarchists sailing under the red flag, plotting to overthrow our Government by force and violence and the use of terrorism", read from a report of the Attorney-General to the effect that "a wave of radicalism appears to have swept over the country" since the signing of the Armistice. [p. 987]. Mr. Box, likewise of the Committee, urged that during deportation proceedings "none of these desperate and dangerous characters should be released for months on bond" [p. 989]. Mr. Goldfogle urged in support of the bill that: "The disclosures made through investigations by both our Committee on Immigration and the Department of Justice show how widespread is this menace to America" [p. 993]. And Mr. Quin declared: "Let us rush through this law and clear our country of this grave menace" [p. 994].

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Applying the principle that all statutes should be given a sensible construction to further the ends which the Legislature has in view (*Church of the Holy Trinity v. United States*, 143 U. S. 457; *Johnson v. Southern Pacific Co.*,

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What is even more significant is that H. R. 11224, which became the Act of June 5, 1920, was not contemplated as a measure singling out alien agitators for special treatment because of any peculiar power of Congress over aliens, but was contemplated merely as one measure in a series of measures directed against both seditious aliens and seditious citizens. In the speeches discussing H. R. 11224, it was pointed out by different members of the Committee on Immigration sponsoring the bill, and by other speakers, that similar legislation, directed against citizens, but with criminal penalties attached, was pending, and that a bill to make seditious literature non-mailable was pending, and all the speakers declared that they hoped that such legislation would be enacted. As one example, Mr. Raker of the Committee declared:

"I simply want to call the attention of the membership of the House to the fact that this bill and this legislation does not deal with the criminal law, and does not make it a crime for a citizen of the United States to do any of the acts provided for in this legislation. Contemplated legislation now pending will take care of the criminal end. There are a number of bills now pending before the Committee on the judiciary making it a crime to do the acts referred to." [59 Cong. Rec., *supra*, p. 982, italics curs. See also speeches by Mr. Byrnes, at pp. 980, 981; by Mr. Siegel of the Committee, at pp. 983, 985; by Mr. Quin at p. 993.]

For instances of this proposed legislation, see S. 3317, 66th Cong., 2nd Sess., H. R. 11430; H. R. Rep. 66th Cong., 2nd Sess. No. 536, No. 542. These bills contained a provision that no "person shall orally or by writing teach, incite, advocate, propose, or advise, or aid, abet, or encourage forcible resistance or forcible destruction of the Government of the United States" (Section 3), and also declared

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196 U. S. 1) we submit that the statutory language must be taken to refer to the forcible overthrow of the Government within a reasonably proximate time and that a necessary premise in the Government's argument is, therefore, wholly unsound.\*

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illegal "any association which seeks directly or indirectly by force or violence, or by injury to or destruction of human beings, or public or private property, to bring about a change in the Constitution or laws or authority of the Government of the United States. . . ."

(Section 9). Section 10 made it a crime for any person "knowing the object, purpose, teaching, or doctrines of such unlawful association" to "become a member thereof or become affiliated therewith, or continue to be a member thereof or affiliated therewith . . .".

The reports accompanying these bills contain the following statement: "The life of the Nation is threatened today, the security and safety of our citizens is imperiled, and it is firmly believed that a strong remedy is demanded by our people—and this bill furnishes such a law as will we believe satisfy the country and enable the authorities to grapple with the growing evil in our midst". See also Sedition, Hearing before the Judiciary Committee of the House of Representatives, 66th Cong., February 4, 6, 10, 1920; Sedition, Syndicalism, Sabotage and Anarchy, Hearings before Judiciary Committee of the House of Representatives, December 11, 16, 1919.

In view of the legislative history of the Act of June 5, 1920, it would not be reasonable to give it a wider scope than would be given to a similar statute penalizing citizens.

\*There is nothing inconsistent with this position in the prior decisions of this Court. Both in *Turner v. Williams*, 194 U. S. 279 and *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, there was evidence referred to by the Court that the aliens had in their public pronouncements addressed themselves to immediate problems in a way which could fairly be denominated "advocacy". In the present case there is no evidence of the attitude of the Communist Party towards any questions of moment at the time when respondent was a member.

Second: An interpretation of the statute to apply to belief in the use of force in the indeterminate, indefinitely remote future would create serious doubt as to its compatibility with the guarantees of freedom of speech, press and assembly contained in the First Amendment. Such a construction must be avoided if possible and there is no obstacle to avoiding it here. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 492; *Japanese Immigrant Case*, 189 U. S. 86, 100-101; *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 307; *United States v. Jin Fuey Moy*, 241 U. S. 394, 401. The Government does not argue that if the statute were enforced by a sanction other than deportation it could be accorded the interpretation sought and still meet the requirements of the First Amendment. It is not denied that the Constitutional guarantees in question extend to aliens along with the other guarantees of the Bill of Rights (*Wong Wing v. United States*, 163 U. S. 228, 238; *Lem Moon Sing v. United States*, 158 U. S. 538, 547; *Downes v. Bidwell*, 182 U. S. 244, 282-3, 294-8; *The Japanese Immigrant Case*, 189 U. S. 86, 100; *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106) and the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Truax v. Raich*, 239 U. S. 33; see *Terrace v. Thompson*, 263 U. S. 197, 216. Nor is it denied that the beliefs and acts which the statute thus interpreted would comprehend are within the protection of the guarantees of free speech, press and assembly and could not be directly proscribed by the Congress. The Government properly regards the decision in *Herndon v. Lowry*, 301 U. S. 242, as establishing at least "that the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted". (Government's Brief, page 23) See also *Whitney v. California*, 274 U. S. 357, *Schenck v. United States*, 249 U. S. 47; *De Jonge v. Oregon*, 299 U. S. 353. The contention which it is conceded "involves



practical as well as logical difficulties" (Government's Brief, page 23) is rather that the power of Congress to deport aliens is wholly unlimited by the First Amendment. In support of this contention the Government argues only that this extraordinary immunity of the deportation power from what was intended to be a limitation on all powers of Congress has heretofore been "assumed". We submit that there is no warrant for such an assumption in the opinions of this Court and that the doctrine thus "assumed" is unsound.

In only one case before this Court has the question of the relationship between the power to exclude aliens and the limitations of the First Amendment been presented. In *Turner v. William*, 194 U. S. 279, it was argued on behalf of an alien who was charged with illegal entry and ordered deported on that ground, that the statutory provision *excluding* anarchists was invalid if interpreted to apply to "philosophical anarchists". In rejecting the contention this Court said, speaking by Mr. Chief Justice Fuller:

"We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, *having entered contrary to law*, is expelled, he is in fact cut off from worshipping, or speaking or publishing or petitioning in the country, but that is merely because of his *exclusion* therefrom. He does not become one of the people to whom these things are secured by our Constitution *by an attempt to enter forbidden by law*. To appeal to the Constitution is to concede that this is

a land governed by that supreme law, and as under it the power to *exclude*, has been determined to exist, those who are *excluded* cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise. (*Italics ours.*)

The care with which this Court limited this expression, as the foregoing passage indicates, to aliens who are *excluded*, far from justifying the assumption that a similar rule applies to the deportation of an alien from a land to which he *does* belong by virtue of an established legal residence there, justifies the contrary assumption. Compare *United States v. Ju Toy*, 198 U. S. 253 and *Quon Quon Poy v. Johnson*, 273 U. S. 352 with *Ng Fung Ho v. White*, 259 U. S. 276. Indeed, it was precisely on the basis of this distinction as applied to the power over aliens generally that Chief Justice Fuller dissented in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 761-3. In that case the constitutionality under the Fifth Amendment of the establishment of an administrative proceeding for the *deportation* of Chinese aliens who failed to comply with the registration requirements imposed by statute was sustained. It was argued for the alien that the registration requirement exceeded the power of Congress and that deportation was a punishment which could not be imposed in an administrative proceeding in which the alien was deprived of the Constitutional protections accorded to persons accused of crime. To sustain the order of deportation it was only necessary to hold that the power of Congress over matters of immigration included the power to require registration and that an order of deportation is not conviction of a "crime" within the meaning of the Sixth Amendment. See *Bugajewitz v. Adams*, 228 U. S. 585; *Mahler v. Eby*, 264 U. S. 32; *Zakonaite v. Wolf*, 226 U. S. 272. It is true that in the course of the opinion by Mr. Justice Gray reference was made to the "right to exclude or to expel all

aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace" as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare". But this statement was unnecessary to the decision and interpreted literally cannot be sustained. As the same Chief Justice who rendered the opinion of the Court in *Turner v. Williams, supra*, said in his dissenting opinion:

"The argument is that friendly aliens who have lawfully acquired a domicile in this country, are entitled to avail themselves of the safeguards of the Constitution only while permitted to remain, and that the power to expel them and the manner of its exercise are unaffected by that instrument. It is difficult to see how this can be so in view of the operation of the power upon the existing rights of individuals; and to say that the residence of the alien, when invited and secured by treaties and laws, is held in subordination to the exertion against him, as an alien, of the absolute unqualified power asserted, is to import a condition not recognized by the fundamental law." (149 U. S. at 762.)\*

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\*Cf. Madison's Report on the Virginia Resolutions—1800, 4 Elliot Debates, 546, at 556 (1888):

"But it cannot be a true inference that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable."

We submit that the decisions in this Court go no further than to sustain the validity of an administrative proceeding against objections founded upon the Sixth Amendment and to establish that Congress has an independent power to legislate with respect to the conditions upon which aliéns may remain within the United States. Whether the latter power is to be understood solely as a derivative of the power to impose conditions of entry, as is suggested in *Zakonaite v. Wolf*, 226 U. S. 272, 275, or as an aspect of a broader power to legislate "with respect to the conduct of an alien while resident here" (*Keller v. U. S.*, 213 U. S. 138, 144), does not appear to have been definitely settled by this Court. In either event, the decisions do not establish that the power of Congress to specify the "causes of deportation" (*Bilokumsky v. Tod*, 263 U. S. 149, 157) is unlimited by the substantive restrictions of the Bill of Rights. They could not establish such a doctrine for the obvious reason that the causes of deportation prescribed in legislation heretofore considered by this Court have all consisted of behavior which might reasonably be prohibited, assuming a power to legislate to exist.\* But the mere existence of the power no more establishes the proposition that it is unlimited by the First Amendment than the existence of the power to regulate commerce implies that that power is not subject

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\*Statements such as that in *Lapina v. Williams*, 232 U. S. 78, 88, that the "authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country"—must be read with this fact in mind. Compare the dictum by Mr. Justice Holmes in *Tiaco v. Forbes*, 228 U. S. 549, 556-7:

"It is admitted that sovereign states have inherent power to deport aliens, and *seemingly* that Congress is not deprived of this power by the Constitution of the United States." (Italics ours.)

to the express limitations contained in the Constitution.\* Indeed, the contention could not be supported without creating the incredible paradox that Congress has no power to take the property of a friendly alien without compensation (*Russian Volunteer Fleet v. U. S.*, *supra*), but has the power to order a friendly alien deported if he fails to surrender gratuitously all his property to the United States. If, in that situation, the power to specify the causes of deportation would be held limited by the substantive provisions of the Fifth Amendment, no reason can be adduced for holding that it is unlimited by the First Amendment. Nor does a decision that the power to specify the causes of deportation is subject to limitations analogous to those imposed by the Constitution on

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\*The fatal weakness of such a position is well analysed in the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 732, at 738:

"Whatever may be true as to exclusion, and as to that see *Chinese Exclusion case*, 130 U. S. 581, and *Nishimura Ekin v. United States*, 142 U. S. 651, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and

(Footnote continued on next page.)



the other powers of Congress deny that in determining the scope of the limitation of the First Amendment, distinctions may validly be drawn between friendly and enemy aliens and between aliens with permanent and temporary residence. See the dissent of Mr. Justice Brewer in *Fong Yue Ting v. U. S.*, *supra*. Nor does it deny that even though aliens are protected by the First Amendment, the existence of an absolute power to *exclude* on any ground may justify admission on condition that the alien surrenders the constitutional rights he would otherwise acquire—although such a view might well contravene the decisions of this Court that unconstitutional conditions may not be imposed. *Western*

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restrictions imposed by the Constitution. In the case of *Mo.ongahela Navigation Company v. United States*, 148 U. S. 312, 336, it was said: 'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.' And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.

"When the first ten amendments were presented for adoption they were preceded by a preamble stating that the conventions of many States had at the time of their adopting the Constitution expressed a desire 'in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added.' It is worthy of notice that in them the word 'citizen' is not found. In some of them the descriptive word is 'people', but in the Fifth it is broader, and the word is 'person', and in the Sixth it is the 'accused', while in the Third, Seventh, and Eighth there is no limitation as to the beneficiaries suggested by any descriptive word."

*Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Power Manufacturing Co. v. Saunders*, 274 U. S. 490; *Terral v. Burke Construction Co.*, 257 U. S. 529; *Frost v. Railroad Commission of California*, 271 U. S. 583; *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494; *United States v. Chicago M. & St. P. R. Co.*, 282 U. S. 311, 324; See *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 342.

The application of such a condition is impossible here, as the Government concedes (Government's Brief, p. 24 n. 2), since respondent entered legally long before the enactment of the statute in question or any similar statute and the legislation is not limited to aliens who entered after its enactment.\* Qualifications and distinctions such as these are not material in the present case. As the Government's position is presented, it is enough to defeat the interpretation sought that the power to deport aliens is limited by the First Amendment. We submit that it is, for precisely the same reasons that the deportation process has been held by this Court to be subject to the procedural requirements of due process of law. *Kwock Jan Fat v. White*, 253 U. S. 454; *Japanese Immigrant Case*, 189 U. S. 86, 100-101; *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 106.

Third: Even if the power to deport is not limited by the First Amendment, we submit that the principles enunciated in that Amendment are of significance in interpreting the language of the statute. As Judge Anderson said in *Colyer v. Skeffington*, 265 Fed. 17, 60:

"Statutory restrictions on immigration, like all other statutes are, if possible, to be construed in accordance with the spirit as well as within the letter of our Constitution, including the First Amendment and its declaration for freedom of speech, press, and assemblage."

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\*Section 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, 8 U. S. C. § 137 (g).

It should not be forgotten that the consequences of a statute prescribing the deportation of aliens on the ground in question here are not limited to the aliens deported. Such a statute operates to deprive citizens of their constitutional right to hear what the alien may have to say and to assemble in organizations with aliens as well as with other citizens. The statute is susceptible, without emasculation, of a construction which renders it consonant with the spirit of the First Amendment. Even if the inexorable command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble" does not limit the power to deport, it is not lightly to be assumed that Congress accorded no significance to the principle of that command in enacting the legislation under consideration in this case.

For the foregoing reasons, we submit, that there is insufficient evidence to sustain the finding contained in the warrant of deportation that respondent, after entry, became a member of an organization that "believes in, advises, advocates or teaches \* \* \* the overthrow by force or violence of the Government of the United States" within the meaning of the act of Congress.\*

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\*The Government's brief (pp. 48-49) cites twelve cases in support of the proposition that "comparable evidence has been held in numerous cases to support a finding by the Secretary that the Communist Party of the United States falls within the ambit of the statute". Of the twelve, in seven, the nature of the evidence introduced is in no way comparable. *Rex v. Buck*, [1932] 3 D. L. R. 97 (Ont. Ct. App.). *Skeffington v. Katzeff*, 277 F. 129 (C. C. A. 1, 1922). *Antolish v. Paul*, 283 F. 957 (C. C. A. 7, 1922). *U. S. ex. rel. Abern v. Wallis*, 268 F. 413 [D. C., S. D. N. Y. 1920]. *Kjar v. Doak*, 61 F. (2d) 566 (C. C. A. 7, 1932). *Murdoch v. Clark*,

## II.

Section 2 of the Act of October 16, 1918, does not authorize the deportation of an alien for membership in an organization warranting exclusion under Section 1, where his membership occurred after entry, but terminated substantially before the institution of deportation proceedings.

Assuming, contrary to the fact, that the evidence suffices to sustain a finding that the Communist Party is an organization which believes in, advises, advocates or teaches the overthrow of the Government by force or violence, within the meaning of the statute, the order of deportation is nevertheless invalid because, as the Government concedes [Government's Brief, p. 8, n. 1], respondent had ceased to be a member of the organization six months before the

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53 F. (2d) 155 (C. C. A. 1, 1931). *In re Saderquist*, 11 F. Supp. 525 (D. C. Me. S. D. 1935), *aff'd*, 83 F. (2d) 890 (C. C. A. 1, 1936). In two, the court does not set forth or discuss the evidence as to the character of the organizations involved. *Wolck v. Weedon*, 58 F. (2d) 928 (C. C. A. 9, 1932). *Re Worozext*, 58 Can. Cr. Cas. 161 (Sup. Ct. Nova Scotia 1932). In the remaining three, the nature of the evidence introduced, and the context and setting of the scanty excerpts quoted, are too insufficiently portrayed to permit a comparison. *Kenmotsu v. Nagle*, 44 F. (2d) 953 (C. C. A. 9, 1930). *Ex parte Vilarino*, 50 F. (2d) 582 (C. C. A. 9, 1931). *Branch v. Cahill*, 88 F. (2d) 545 (C. C. A. 9, 1937).

The additional cases cited by the Government [p. 49, fn. 15], as holding "that even in the absence of evidence as to the aims and objectives of the Communist Party of the United States, proof of membership in that Party is alone sufficient to support deportation", need not be considered as the Government does not attempt to sustain such a position. Insofar as these cited cases support or suggest the validity of such a view they are, for reasons heretofore stated, untenable.

institution of deportation proceedings against him. Section 2 of the Act of 1918 provides for the deportation of "any alien who, *at any time* after entering the United States, is found to have been at the time of entry, *or to have become thereafter*, a member of any one of the classes of aliens enumerated in Section 1 of this Act". The relevant provision of Section 1 is—"(c) Aliens who believe in, advise, advocate, or teach, or who *are* members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States . . .". The Government argues, relying upon the opinion of Judge Chase and Judge Manton in *U. S. ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707, that this statutory language plainly covers any alien who, after entry, becomes a member of an organization, membership in which, at the time of entry, would have warranted his exclusion, even though he was not so at the time of arrest or at the time the warrant of deportation issued.\* We submit that the language requires no such interpretation—that on the contrary when Section 2 and Section 1 are read together, the language points to the opposite conclusion and that this interpretation is shown to be correct by a consideration of the legislative history of the statute, of its other significant provisions, and of the theory upon which deportation rests.

First: As a matter of grammar and rhetoric, it seems clear that the phrase "*at any time*" in Section 2 modifies

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\*Judge Augustus Hand concurred in the result on another ground, finding it "unnecessary in this case to determine whether former membership in a proscribed organization is sufficient to justify the deportation of an alien who has been expelled for failing to conform to its principles". [57 F. (2d) 707, 708.] In the District Court Judge Mack had also found it unnecessary to decide the question (Record, p. 57).



the participle "found" and not the subsequent infinitive phrase "to have become thereafter". Accordingly, the presence of the words "at any time" is without significance in the present context. The Government must therefore contend that the words "to have become thereafter" unambiguously indicate that the membership to which the statute refers need only have occurred at some time after entry and may have terminated at any time no matter how long prior to the institution of deportation proceedings. But this contention overlooks the vital fact that in defining the excluded class in Section 1, Congress spoke in the present tense of aliens who "*are*" members. It was necessary in Section 2 to use the past infinitive "to have been" in referring to aliens who were members at the time of entry, and it was obviously grammatically convenient to adhere to the past infinitive in referring to aliens who were not members at the time of entry but became members thereafter\*. Otherwise the statutory language would have had to be: "any alien, who, at any time after entering the United States is found to have been at the time of entry, or to be thereafter", a formulation which would not have distinguished as sharply as the present language does between membership existing at the time of entry and membership occurring subsequently, and which in any event would not have avoided the argument made by the Government here.

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\*Elsewhere in the statute Congress, for reasons of grammatical convenience, employed a verb in the past tense, but obviously with a present meaning, immediately after another verb properly in the past tense. See Section 19 of the Act of 1917: "Any person who shall be arrested . . . on the ground that he *has entered or been found* in the United States in violation of any other law thereof . . . shall be deported"; and compare the language appearing previously in the same section: "Any alien who shall *have entered* or who shall *be found* in the United States in violation of this act, or in violation of any other law of the United States . . .".

In thus succumbing to grammatical temptation, Congress concededly produced an awkward locution: aliens who are found *to have become* members of a class consisting of aliens who *are* members of a designated organization. The awkwardness of the locution does not deprive the present tense in the final clause of its governing significance. The Government's argument requires a reading of Section 1, which deprives the double nominative "aliens who are members" of all significance and reduces the combined clauses to "aliens who are found to have become members". Had the statute read expressly "any alien who is found after entry to have become a person who believes in" the designated doctrine or "who belongs to or is affiliated with" the designated organizations, the contention would be obviously untenable, yet that, we submit, is precisely what the statute says if the double nominative in Section 1 (c) is not ignored. The more plausible interpretation of Section 2 perceives in the use of the past infinitive no more than a recognition that the act of becoming was one to take place subsequent to the entry and necessarily prior to the finding, and deduces an intent to go no further than to render aliens deportable for causes which would have warranted exclusion had they existed at the time of entry. But Section 1 does not provide for the exclusion of aliens who *formerly*, but not at the time of entry, held the designated beliefs or were members of the designated organizations; it ignores the past and deals with the present.

That this analysis is correct seems clear when the problem is considered in the perspective achieved by examination of other provisions in the statute. Thus, Section 19 of the Act of 1917 [39 Stat. 874], in specifying the causes of deportation of aliens who entered lawfully, is concerned with conditions existing at the time of the proceedings in every case but one—conviction in this country of a crime involving moral turpitude; and in that case a time limit

is provided for a first offense and the statute is in any event rendered inapplicable by express language to an alien who has been pardoned or who the sentencing judge recommends should not be deported. It is hardly to be supposed, for example, that the reference to "any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing" was intended to authorize the deportation within the five-year period of a prosperous alien in no danger of becoming a public charge, merely because at some earlier time in the five-year period when the Secretary had failed to act, the alien had become a public charge for a short time. Yet, had Congress said, as it easily might have said, "any alien who within five years after entry is found to have become a public charge", etc., the Government's argument in this case would be strictly applicable there. Indeed, Congress seems to have experienced no difficulty in unambiguously according significance to past conditions when it intended to do so, as in the case of conviction of crime referred to *above*\* and in the provision of Section 3 of the Act of 1917 excluding "all idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at *any time previously*". There is therefore no justification for the statement in the majority opinion in the *Yokonen* case, *supra*, which the Government advances here, that the language plainly authorizes the deportation of an alien for former membership in an organization, present membership in which would have warranted his exclusion under Section 1; if any reading can be said to be plain, it is that past membership no more suffices for deportation than it would have sufficed for exclusion.

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\*Compare the reference in Section 3 of the 1917 Act to the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude".

Second: The legislative history of the statutory provisions in question gives clear confirmation to the view that in using the phrase "to have become", Congress did not intend to make former membership after entry sufficient to warrant deportation.

By the Act of 1903 [32 Stat. 1214], Congress provided for the exclusion of "persons who believe in or advocate the overthrow by force or violence of the Government of the United States" (Section 2), and in addition any "person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government" (Section 38). The only provision in the statute for the *deportation* of such persons applied to aliens who entered in violation of the statute and who were proceeded against within a designated time. These provisions were re-enacted in the same form by the Act of February 20, 1907 [34 Stat. 898].

The first provision for the deportation of such persons who *entered lawfully* was made in H. R. 6060, enacted by the 63rd Congress but vetoed by President Wilson in a message dated January 28, 1915 [House Document, 63rd Cong., 3rd Sess., Vol. 6889, No. 1527]. In addition to the exclusion provision of the earlier acts, this bill provided that "any alien who within five years after entry shall be found advocating or teaching" the specified doctrines shall be deported. It also reformulated the provision for deportation of aliens who *entered* illegally, providing "that at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law" shall be deported. Substantially the same measure was introduced in the 64th Congress [H. R. 10384] and enacted February 5, 1917 over the Presidential Veto [39 Stat. 874]. During the course of the passage of this bill in the House, Mr. Burnett, the Chairman of the Committee on Immigration in charge of the

bill, moved on behalf of the Committee to amend Section 19 by inserting the phrase "at any time" so as to read, as Section 19 of the Act finally came to read, that "any alien who at any time after entry shall be found advocating or teaching" the specified doctrines shall be deported. The purpose of the amendment was to make clear that there was to be no time limitation on deportation of aliens found advocating the designated doctrines.\*

\*In moving this amendment, Mr. Burnett said:

"That will provide that those who are here, advocating or teaching the unlawful destruction of property at any time, shall be deported, so that there will be no question of a time limit.

"Mr. Stafford. I should like to inquire of the chairman of the committee whether that would apply to an alien who had developed the practice or idea of advocating the unlawful destruction of property since he came to this country?

"Mr. Burnett. Yes; if he advocates or teaches it. The purpose of it is so that there shall not be any time limit to the deportation of those who teach anarchy after they come over here.

"Mr. Burnett. The only change made in this bill from the bill that was vetoed is that we do not want a time limit of five years to apply to it. Some of the excluded classes have a time limit of five years, and after five years they are not deportable; but those who teach anarchy or the destruction of property ought not to fall within that time limit." [53 Cong. Rec., pt. 5, p. 5165, 64th Cong., 1st Sess., March 30, 1916.]

See also Sen. Rep. No. 352, p. 14, 64th Cong., 1st Sess., Vol. 6898, accompanying H. R. 10384:

"To the fullest extent practicable this section [i. e., Section 19] has been made to include all of the classes subject to deportation after having entered the country; this is accomplished in two ways, first, by enumerating the classes and indicating the period, where any is set, within which deportation must be effected, and second \* \* \*"



The 1917 statute was amended by the Act of October 16, 1918, which dealt solely with what the title of the Act referred to as "aliens who *are* members of the anarchistic and similar classes" [40 Stat. 1012].\* Section 1 expanded somewhat the categories of aliens excluded on this ground, for the first time specifically including "aliens who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States".\*\* Section 2 of the Act dealing with deportation modified Section 19 of the 1917 statute with respect both to substance and to form. With respect to substance, the statute retained the provision for the deportation of aliens who at the time of entry were members of one of the excluded classes, but eliminated therefrom the five-year period of limitation contained in Section 19. Moreover, the provision of Section 19 for the deportation of aliens of what the statutory title denominated the "anarchistic and similar classes" was significantly expanded. Whereas the Act of 1917 referred only to "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law, or the assassination of public officials", the Act of 1918 broadened the causes of deportation so as to include all the causes of exclusion specified in Section 1, which themselves expanded, as we have said, the causes of exclusion

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\*The full title was: "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes". That the title of a statute is of significance in its interpretation, see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462:

\*\*This section was subsequently amended by the Act of June 5, 1920 [41 Stat. 1008] in a manner which does not substantially affect the present case.

provided by the 1917 Act. Accordingly, while there was no provision in the 1917 Act for the deportation of aliens who did not personally advocate the specified doctrine but were members of organizations that did, the 1918 Act contained such a provision. So far as the Committee reports show, this change, coupled with the elimination of the time limitation referred to above, and two other changes not material here\* was the sole purpose of the 1918 statute [House Rep. 645, 65th Cong., 2nd Sess., accompanying H. R. 12402; Senate Rep. 65th Cong., 2nd Sess. No. 648]. Nothing in these substantive modifications or in the purpose behind them supports the Government's argument that Section 2 was intended to make former membership enough.

But in addition to these substantive changes, the Act of 1918 made a *formal* change. Whereas Section 19 of the 1917 statute separated into *distinct clauses* the provision for the deportation of an alien "who at the time of entry was a member of the classes excluded by law" and that applying to an alien "who at any time after entry shall be found advocating or teaching" the specified doctrine, Section 2 of the 1918 Act combined the provisions concerning the two groups and dealt with them in a single sentence unbroken by semi-colons. It is upon the location thus engendered and what the Government contends to be its grammatical implications, that the entire argument rests. But it is hardly to be supposed that so momentous a consequence was intended to flow from this formal modification without some affirmative evidence to that effect, and no such evidence exists.

The Government states [Government's Brief, p. 19] that it has been the long continued administrative practice of the Department of Labor to apply Section 2 of the Act

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\*One made it a felony for those deported under the Act to return; the other removed certain clauses that seemingly, under the Act of 1917, qualified the term "anarchists."

of 1918 to cases of past membership. The private bill of July 5, 1937, referred to by the Government, gives no support to this suggestion. The Congressional amnesty may very well rest on the view that the statute was misapplied and, in view of the decision in the *Yokinen* case, *supra*, difficult to rectify in the lower Courts and impossible here until some conflict induced this Court to review the question.\* No other evidence of departmental practice is adduced. On the contrary, both the Department of Justice and the Department of Labor seem to have taken the view as early as 1920 that the membership provisions of the statute are concerned with present membership. Thus, the analysis of the 1918 Act by the Department of Justice in a memorandum to its special agents dated August 12, 1919 refers only to "those who *are* members" [H. R. Rep., 66th Cong., 2nd Sess., No. 504, p. 9], and a communication of the Assistant Secretary of Labor to the Commissioner General of Immigration, dated April 6, 1920, specifically states: "When membership has been withdrawn under circumstances satisfactorily establishing good faith the accused alien does not come within the proscriptions of the Act of October 16, 1918, as to membership." [Hearings, Communist and Anarchist Deportation Cases, H. R. 66th Cong., 2nd Sess., Sub-Committee on the Committee on Immigration and Naturalization, April 21st to 24th, 1920, p. 17.] These rulings preceded the enactment of the amendatory Act of June 5, 1920 [41 Stat. 1008-1009] in which the provision in question was left unchanged.

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\*It is significant that in the letter of the Secretary of Labor, which is a part of Senate Report No. 769, to accompany H. R. 1731, 75th Congress, First Session (referred to in the Government's Brief, p. 19), the Department's decision to direct deportation in the particular case is explicitly stated to be based upon prior judicial decisions and no reference is made to any administrative construction reaching the same result as the *Yokinen* case, *supra*.

Third: What the language of the statute and its legislative history teach is forcefully confirmed by a consideration of the ends to be achieved by deportation and the theory upon which the deportation process rests. After bitter division on the question [see *Fong Yue Ting v. United States*, 149 U. S. 698], it has been authoritatively established by this Court that the deportation laws are not criminal laws.\* *Fong Yue Ting v. United States*, *supra*; *Wong Wing v. United States*, 163 U. S. 228; *Bugajewitz v. United States*, 228 U. S. 585; *Bilokumsky v. Tod*, 263 U. S. 149; *Mahler v. Eby*, 264 U. S. 32. Accordingly, unlike penal laws, the primary purpose of which is to deter the commission of criminal acts [see *Hopt v. Utah*, 110 U. S. 574, 579; *Huntington v. Atrill*, 146 U. S. 657; *Pennsylvania v. Ashe*, 302 U. S. 51; cf. *McBoyle v. United States*, 283 U. S. 25; *Westfall v. United States*, 274 U. S. 256; *United States v. Alford*, 274 U. S. 264; *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 441], the deportation laws are addressed to the elimination from the United States of individuals whose continued residence Congress has determined to be dangerous. [See *e. g.*, *Mahler v. Eby*, 264 U. S. 32, 39.]\*\* It is therefore in a sense inappropriate to designate a cause of deportation as a "deportable offense",

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\*The issue was one which had been agitated ever since the Alien and Sedition Laws. See *e. g.*, Madison's Report on the Virginia Resolutions [1800], 4 Elliott Debates [1888] 546 at 554-5; see also the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting v. United States*, 149 U. S. 698, 732, 740-741.

\*\*The opinion of the Court by Chief Justice Taft speaks as follows: "It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment . . . Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the existence of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society."

as the majority opinion in the *Yokinen* case does [57 F. (2d) 707, 708]. An analogy more perfect than one drawn from the criminal law is provided by the common legal provision for the commitment of the insane, which has for its purpose the incapacitation of individuals because they are dangerous and so long as they continue to be. [See *Sinclair v. State*, 161 Miss. 142, especially the concurring opinion of Ethridge, J.] Indeed, if this view of the deportation process were not the only tenable one, if the purpose of the deportation laws were to provide an additional deterrent from the commission of undesirable acts, it is difficult to see upon what theory the decisions sustaining the administrative procedure [*e. g.*, *Fong Yue Ting v. United States*, *supra*], sanctioning a retroactive application [*Bugajewitz v. United States*, *supra*; *Mahler v. Eby*, *supra*], and permitting an adverse inference from silence [*Bilokumsky v. Tod*, *supra*] could have been reached or could now be sustained.

If the dominant end of the deportation laws is to identify dangerous individuals and provide for their expulsion from the country, the unreasonableness of the interpretation which the Government seeks to place upon the language of the statute is made strikingly clear. For it is inconceivable that Congress intended to provide that an alien who, many years ago, was for a short time a member of an organization specified by the statute, but ceased to be such a member a long time ago, is an individual of such dangerous potentialities that his removal from the country is necessitated in the public interest. Indeed, the Government's interpretation, if accepted, cannot be limited to past membership; it must apply also to past belief. The consequence, therefore, would be to attribute to the Congress a solemn finding that any alien who, at any time after entry, has believed in the overthrow of the Government of the United States, represents a danger to established American institutions, no matter how short the period for



which the belief was held or how long ago the belief was supplanted by a passionate devotion to the Constitution of the United States. Such an interpretation would not further the purpose of the statute to protect the United States against dangerous individuals, but would pervert the fundamental theory upon which deportation rests. Moreover, even if the incidental effect of the statute on the behavior of the alien population is to be considered, an interpretation to apply to past membership would not tend to reduce the number of individual aliens embracing dangerous views, but would have precisely the opposite effect, for there would be no incentive to abandon views once held. Such an interpretation would not only deny a *locus poenitentiae*, but it would tend to cut off aliens, once persuaded to join a proscribed organization, from exposing themselves to the persuasive effect of education and contrary argument in the course of the play of the democratic process, since their initial decision would forever damn them to deportation. All statutes should be interpreted in the light of and in furtherance of their purposes, and especially is that the case where an interpretation subservient to the purpose will result in ameliorating the rigor of a law which carries a heavy burden of "possible human woe". [Hough, J., in *United States ex rel. Karamian v. Curran*, 16 F. (2d) 958, 961.]\*

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\*An additional reason for such interpretation is the fact that, as the Circuit Court of Appeals for the Sixth Circuit pointed out in *Browne v. Zurbrick*, 45 F. (2d) 931, 932, by "the Act of March 4, 1929, § 1 (a-c), as amended by Act June 24, 1929 (8 U. S. C. A. § 180), the alien is forever barred from re-entry, even if after arrest he is allowed to and does go out voluntarily. Not only that, but if he returns he is to be imprisoned as a felon. Thus, deportation becomes as to aliens who have established a domicile here a decree of perpetual punishment—regardless of fixed family and business ties and connections . . .".

## III.

The question of the sufficiency of the evidence to sustain the finding in the warrant of deportation that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States, is not before this Court. In any event, the Circuit Court of Appeals correctly held that the evidence is insufficient.

First: Although the question of the sufficiency of the evidence to support the finding in the warrant with respect to respondent's personal belief was decided against the petitioner by the Circuit Court of Appeals, it was not presented by the petition for certiorari nor included in the specification of errors to be urged (see pp. 10-11, *supra*). There is nothing to indicate that the question was decided by the District Court in dismissing the writ of habeas corpus (R. 65), nor was it necessary to consider the question if that Court regarded the evidence as sufficient to sustain the finding with respect to membership. The Government's brief concedes that the question does not present an issue "calling for review by this Court" (Government's Brief, p. 50). Without urging that the question *ought to be considered*, it is nevertheless submitted "for consideration", with the suggestion that this Court has the power to consider it, if it desire to do so. Neither the cases cited by the Government (Brief, p. 50) nor any decision that we have been able to find affirms the existence of a power to reverse the judgment below at the behest of the petitioner, as distinguished from the respondent\*, on a ground not assigned in the petition or in the respondent's statement and not involving a question of jurisdiction or an event occurring after the issuance of the writ of cer-

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\*See *Langnes v. Green*, 282 U. S. 531, 538 (1931).

tiorari\*. . . But conceding that the power exists\*\*, the decisions clearly indicate a disposition against its exercise, for in all the decisions cited by the Government, as well as those that counsel for respondent have been able to find, a request to consider such a question has been summarily refused\*\*\*. Indeed, were a practice to be adopted in favor of consideration of such questions in cases like this, it would render largely nugatory the scrupulous limitations

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\*See *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9 (1918).

\*\*See *Washington Coach Co. v. N. L. R. B.*, 301 U. S. 142, 146 (1937); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938); compare *Olmstead v. United States*, 277 U. S. 438 (1928).

\*\*\**Connecticut Ry. & Lighting Co. v. Palmer*, No. 63, 59 Sup. Ct. 316, 320, 324 (Jan. 3, 1939); *Steele v. Drummond*, 275 U. S. 199, 203 (1927); *Gunning v. Cooley*, 281 U. S. 90, 98 (1930); *Webster Electric Co. v. Splitdorf Electric Co.*, 264 U. S. 463, 464 (1924); *Olson v. United States*, 292 U. S. 246, 262 (1934); *General Talking Pictures Corp. v. Western Electric Co.*, *supra*, n. \*\*; *Washington Coach Co. v. N. L. R. B.*, *supra*, n. \*\*; cf. *Johnstown v. Manhattan Ry. Co.*, 289 U. S. 479, 494 (1933); see *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242 (1918); *Helvering v. Taylor*, 293 U. S. 507, 511 (1935); *Prudence Co. v. Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, 208 (1936); *Morehead v. N. Y. ex rel. Tipaldo*, 298 U. S. 587, 604 (1936); *Crown Cork & Seal Co. v. Gutmann*, 304 U. S. 159, 161 (1938). *Robertson & Kirkham*, Jurisdiction of the Supreme Court of the United States (1936) § 389.

It is of no significance in this respect that the judgment of the Circuit Court of Appeals, of which the petitioner complains, is one reversing the judgment of the District Court. *Steele v. Drummond*, *supra*; *Webster Electric Co. v. Splitdorf Electric Co.*, *supra*; cf. *Johnstown v. Manhattan Ry. Co.*, *supra*; see *Helvering v. Taylor*, *supra*; *Prudence Co. v. Fidelity & Deposit Co. of Maryland*, *supra*; *Morehead v. N. Y. ex rel. Tipaldo*, *supra*.

on review by certiorari imposed by this Court in the exercise of a wise self-restraint. The practice to be observed was referred to in an opinion by Mr. Justice Reed as recently as January 3, 1939. *Connecticut Railway & Light Co. v. Palmer*, No. 63, 59 Sup. Ct. 316, 320, 324.

Second: In any event, the Circuit Court of Appeals correctly held that there is insufficient evidence to sustain the finding in the warrant of deportation that respondent "believes in and teaches the overthrow by force and violence of the Government of the United States". A review of all of the relevant evidence shows its insufficiency more clearly than the selective process employed in discussing the evidence in the Government's brief. The testimony of the witness Levering (R. 17-27); a former prostitute unable to read or write (R. 20, 32), who had ceased to be the respondent's mistress a year before the deportation proceedings (R. 24, 41), was patently without significance. Her statement that respondent, whom she knew to have been "for Smith" for President in 1928 (R. 25), was claimed by a "good many people" (R. 23)—only two of whom she could name—to "believe in Communism" or "to be a Communist", goes no further than to exemplify what the Court below aptly designated as "the tyranny of labels over certain types of mind". A number of character witnesses from the community testified to respondent's good reputation, and that in their frequent associations with him they had never heard him advocate or express opposition to government (R. 28, 49, 51, 52-3, 60-3). The testimony at the prior naturalization hearing of the officer Brown, the record of which was introduced at the deportation hearings (R. 19), that when respondent was arrested at his restaurant for violation of the National Prohibition Act he said "to hell with the Government of the United States and everybody connected with it", hardly sustains the inference that he was devoted to the cause of

violent revolution. Accordingly, if the finding is to be sustained, it must rest solely upon the respondent's own testimony.

At the first deportation hearing, respondent testified that he had read "No. 1 and No. 2 books" of Karl Marx; that he did not know whether they had a title; that he had bought them in 1920 for \$7.50 and sold them six months later at a profit; that Marx "was opposed to the owning of property" but that respondent did not accept his teaching because "there was too much prosperity here at that time" (R. 11); that he did not "know exactly" what the Communist Party stood for at the time he joined it; that he believed in the ownership of property by individuals; that he did not believe in the overthrow of the Government of the United States and the establishment of a workmen's government "from a Communist standpoint"; that he did not distribute or cause to be distributed "anarchistic literature"; that he received the "Daily Worker" for a short time, it having been sent to him by a former roomer in lieu of \$10 back rent; that his belief "in the way of government" was that "it is best like we have here. We have a good Constitution for the people, by the people. We have a lot of grafters, as you know, that should be gotten rid of." (R. 13) He further testified on examination by his own attorney that he discontinued his membership in the Communist Party because he "didn't like it"; that he had never seen or had in his possession at any time any literature "that advocated or taught the killing of United States Government officials or the officials of any other organized government"; that he did not believe in the killing of United States Government officials simply because they are United States Government officials; that he did not believe in sabotage or the unlawful destruction of property (R. 16); that when he joined the Communist Party he did so "to find out what it meant"; that "merely speculating", he had bought some Soviet Russian bonds which



"paid good dividends", because he wanted to invest his money and make a profit (R. 17).

At the second deportation hearing, respondent testified further that he had never considered himself "as a Communist"; that he did not now consider himself one (R. 55); that "we should not organize against the Government is my belief"; that he did not think "that capitalist(s) work against working class of people"; that he did not advocate "the working class of people using guns or other destructive means to overthrow our Government or any other government"; that he did not believe or advocate "that government is killing us"; that he did not believe in the overthrow of government; that he was not interested in efforts to stop the transportation of weapons to China or "anything like that"; that he was "satisfied with working conditions in America"; that his idea about the proper means to employ to make changes in the Government is by "voting and elections of good officials". In response to the question whether respondent considered himself "a working man or a capitalist", he answered: "As I understand it, when you have a few dollars you are considered a capitalist and as I have a few dollars and am also a working man, I would think I am both".

Nothing in respondent's testimony at either of these hearings permits any other conclusion than that respondent is shown, as the Court below said, to be "a small bourgeoisie, a merchant, with a little capital, some canniness, a fair amount of human kindness, some bad habits, and apparently no quarrel with the Government of the United States, but only with what he regards as the evils of Capitalism as such, and with grafters holding Government offices" (R. 72).

At the hearing on petitioner's application for naturalization, the record of which was introduced in the deportation proceeding (R. 38-44), petitioner acknowledged that he had joined the Communist Party and paid a lump sum

of forty cents in membership dues (R. 42); that he had bought Soviet bonds for his "own protection" (R. 43); that he "may have handed somebody" some "Communist literature" but was "unable to recall just who it was"; and that he had received the "Daily Worker" as stated above. He also testified that he made no further payment to the Communist Party; that he was not "a Communist at heart"; that he did not consider himself "a Communist" because he was not paying dues to the Communist Party; that he did not know "whether we shall ever have a Communist system in the United States"; that he had read Marx's books and "Marx states that sooner or later there will be a Red Government in every country in the world"; that if "Communism comes in this country I will not be against it, because I have got to go with the people, and whatever the people want I will have to go along with them". Needless to say, these statements provided no basis for the finding in the warrant of deportation.

The Government points to the transcript of respondent's statements at a preliminary inquiry before an immigration inspector subsequent to the naturalization hearing and prior to the issuance of the warrant of arrest (R. 30-34). Respondent testified in the deportation proceedings that this transcript was inaccurate; that the "answers as transcribed were not as given by me. They never put my answers in as I told him, and I could not stop him. I was excited and intimidated. He looked at me hard and hammered on the desk. He was mad and made me mad." (R. 10, 6) But even if the transcript—which rests upon the verification of an immigration inspector who testified at the hearing, on the return of the writ of habeas corpus, "that he might have edited the alien's statements to correct the grammar, transposition, or something of that sort", "that he did not advise the alien of his right to counsel" and that "there was no warrant of arrest" but that "he and the policeman carried the alien with his consent to

the jail" (R. 6-7)—is to be taken as correct, nothing in the statement as reported sustains the finding. Respondent's testimony was that he was familiar with the intents and purposes of the Communist Party at the time of his initiation; that he acquired a prior knowledge of Communism from a study for about ten years of the writings of Marx; that he was "in accord with Marx in regard to the social order of things" (R. 32); that the Communist Party proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that he did not know what means the Communist Party will use to attain its purpose; that its leaders say that it will resort to armed force in the event that should be necessary; that "the destruction of Capitalism is inevitable" and "the sooner it comes the better off we shall all be"; that he would not personally bear arms against the present United States Government at this time because Communism is not strong enough now; that he had handed out some papers obtained from the headquarters in Kansas City, which consisted of something calling upon the people to unite against Capitalism; that Capitalism and the present Government of the United States are "all the same thing". Quite apart from the striking differences between these statements and respondent's earlier testimony in the naturalization hearing, as well as his later testimony in the deportation proceedings, a discrepancy which suggests interesting implications in the immigrant inspector's admission that he had edited the transcript, it is to be observed that this language contains no affirmative statement that respondent would be prepared to take up arms against the Government of the United States at any time. Accordingly, the inspector seems to have put a further question, which the Court below properly denominated as "foolish" and which the respondent answered, as the Court below said "foolishly, according to its folly". The question was: "Supposing that the majority of the populace of the United

States were Communists, and were certain of a victory over Capitalism in an armed conflict, would you then personally bear arms against the present Government?" Respondent answered: "Certainly; I would be a fool to get myself killed fighting for Capitalism." Inasmuch as, if the condition presupposed in the question were ever to come about, the necessity for an armed conflict between "the majority of the populace of the United States" and "Capitalism" could only arise if the will of the people were thwarted by undemocratic resistance, and inasmuch as respondent obviously interpreted the question further to presuppose the existence of an armed conflict, the folly of the question is evident and the foolishness of any answer inevitable. Nevertheless, the Assistant to the Secretary found\* that the evidence indicated that respondent not merely "believes in" but also "teaches the overthrow by force and violence of the Government of the United States". There is absolutely no evidence that respondent in any

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\*The record does not contain an examiner's summary of recommendation following the second deportation hearing. The summary of the first hearing at which respondent's prior statements were incorporated in the record is as follows:

"From the evidence adduced at this hearing, it appears that Joseph Strecker first entered the United States November 7, 1912, at New York, N. Y., ex S.S. 'Bremen' and has remained in the United States since that time. It appears that about November 3, 1932, he became a member of the Communist Party, and accepted certain Communist literature for distribution, at that time. His membership book is incorporated in the evidence, but not the circular that he caused to be distributed. On two former occasions he admitted to Government officers that he was a Communist, and believes in the Communist doctrines. At this hearing he admits that he has been a Communist, but denies being in or belonging to the order at the present time. It is believed that the charges in the warrant of arrest have been sustained by the evidence."

relevant sense "teaches" anything, and we submit that the evidence with respect to respondent's personal belief was not, in the language of the Chief Justice in *Consolidated Edison Co. v. National Labor Relations Board*, 59 Sup. Ct. 206, 217, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that respondent believes in the violent overthrow of the Government of the United States.

Third: Assuming, *arguendo*, that the evidence sufficed to sustain a finding that respondent "believes" in the overthrow of the United States Government by force at some remote and hypothetical time, the evidence would nevertheless be insufficient under the statute properly construed. Applying the rule of *ejusdem generis* (*United States v. Bitty*, 208 U. S. 393, 402; *Hansen v. Haff*, 291 U. S. 559, 562; *United States v. Salen*, 235 U. S. 237, 249) we submit that the belief to which the statute refers, along with advice, teaching and advocacy, is not belief which is expressed only in response to questions at an official inquiry at which an adverse interest may be drawn from silence (*Bilokumsky v. Tod*, 263 U. S. 149; but *cf. U. S. ex rel. Kettunen v. Reimer*, 79 F. [2d] 315, 317 [C. C. A. 2nd]). But this conclusion is necessitated by considerations even more forceful than the rule of *ejusdem generis*. As we have previously urged (pp. 49-56, *supra*), the power of Congress to deport aliens is limited by the guarantees of individual freedom contained in the First Amendment, and this limitation would preclude respondent's deportation even if he had advocated that the beliefs which the Government attributes to him should be practiced. The limitation is the more strikingly applicable where the cause advanced for deportation is not advice, teaching or advocacy, but personal belief alone. For what this Court has said of freedom of speech is even more clearly applicable to "freedom of thought", "that it is the matrix, the indispensable condition, of nearly every other form of freedom", and that with "rare aberrations



a pervasive recognition of that truth can be traced in our history, political and legal." *Palko v. Connecticut*, 302 U. S. 319, 327. Indeed, inasmuch as the finding in the warrant of deportation recites that respondent "believes in and teaches" the specified doctrine and no effort has thus far been made by the Government to rely upon respondent's belief alone, we submit that if the statute were to be construed to apply solely to belief, the Constitutional question raised by such an interpretation at this juncture would be open in this Court, and the statute thus construed, would be invalid under the First Amendment and under the due process clause of the Fifth Amendment as well\*. Compare *Missouri v. Gehner*, 281 U. S. 313; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673; see *Wiborg v. United States*, 163 U. S. 632, 658-660; *Clyatt v. United States*, 197 U. S. 207, 221-222.

### CONCLUSION.

The Government also contends that the Circuit Court of Appeals erred in amending its order of reversal to provide for a trial *de novo*, as suggested by the Circuit Court of Appeals for the Ninth Circuit in *Ex parte Fierstein*, 41 F. (2d) 53. See also *Whitfield v. Hanges*, 222 Fed. 745 (C. C. A. 8th); *Ng Fung Ho v. White*, 259 U. S. 276. In what situations a trial *de novo* may be appropriate in a District Court and may be ordered by the Circuit Court in the exercise of its duty under Rev. Stat. § 761 (28 U. S. C., § 461) to "dispose of the party as law and justice require" (compare *Mahler v. Eby*, 264 U. S. 32, 46), it

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\*It is to be observed in this connection that as one of the grounds of invalidity of the warrant of deportation, the petition for habeas corpus alleges generally that petitioner "has been denied due process of law".

is unnecessary in the present case to decide. Since the warrant of deportation was void for the reasons assigned by the Circuit Court of Appeals and the additional reasons set forth above, there was no occasion for any further proceedings and respondent was entitled to be discharged.

For the foregoing reasons, respondent prays that the amended judgment of the Circuit Court of Appeals be modified to direct that the writ of habeas corpus be sustained and the respondent discharged with cancellation of his bail.

Respectfully submitted,

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CAROL KING,  
of Counsel.



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IMMIGRATION AND NATURALIZATION SERVICE

No. 330

EUGENE KESSLER, District Director of Immigration  
and Naturalization,

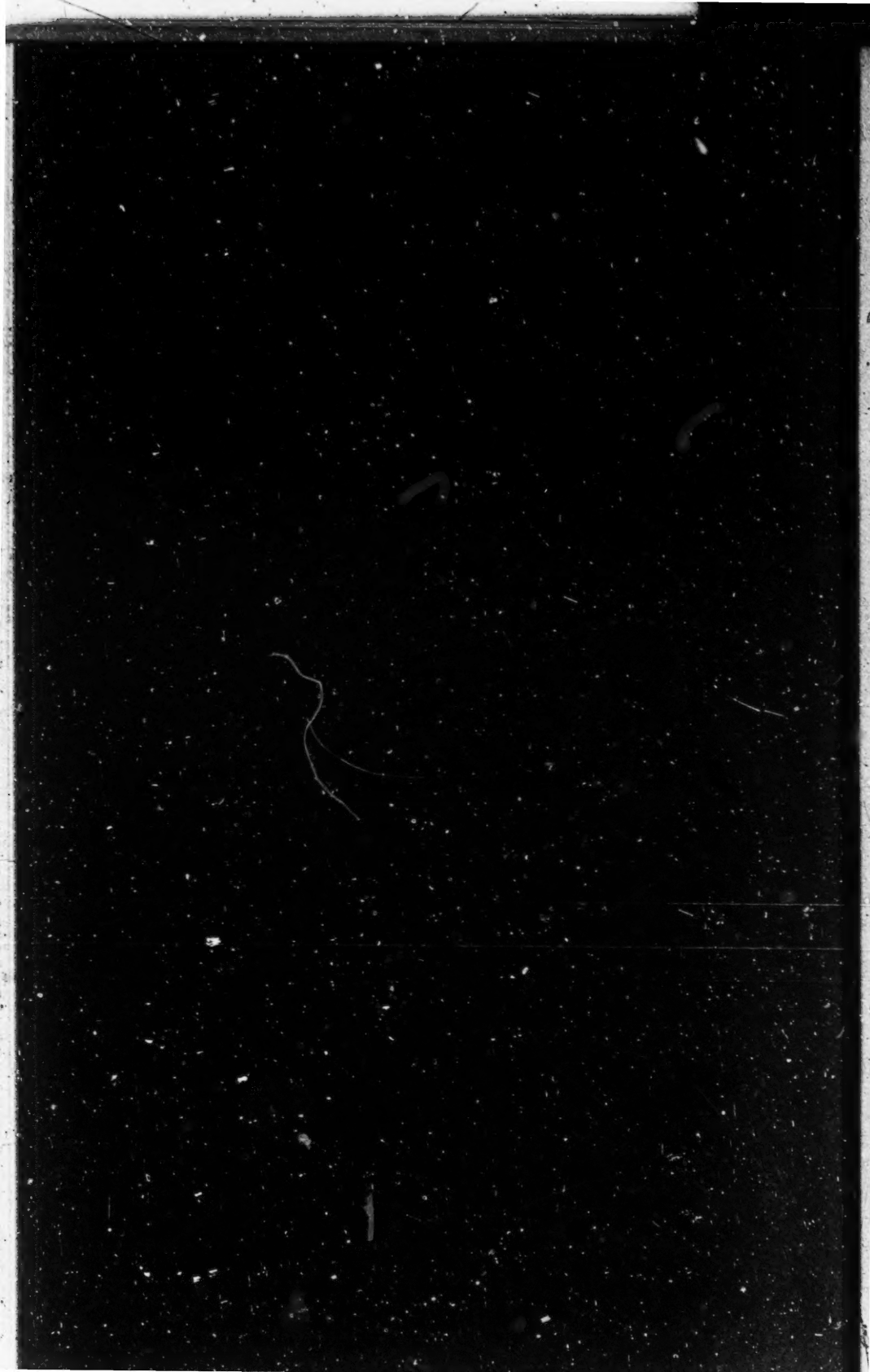
Respondent,

vs.  
JOSEPH GEORGE STROCKER.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

MARTIN DING,  
Amicus Curiae.





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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

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**No. 330**

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**EUGENE KESSLER, DISTRICT DIRECTOR OF IMMIGRATION  
AND NATURALIZATION,**

*vs.*

*Petitioner,*

**JOSEPH GEORGE STRECKER.**

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT.

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**BRIEF AMICUS CURIAE, FILED ON BEHALF OF  
MARTIN DIES, M. C.**

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**I. Preliminary Statement.**

This case raises questions with respect to the rights of aliens under the Constitution and Laws of the United States which are of vital interest to our Government and its citizens. My purpose in presenting this brief is:

1. Generally to supplement petitioner's presentation in the respects and to the extent necessary for an adequate coverage of the facts, issues and law in this case; and

2. To call attention to certain omissions and the distorted treatment of certain inclusions in petitioner's appeal; and

3. To indicate certain questions which petitioner seeks to inject into this case that are not properly raised by the Record.

## **II. Question Presented.**

Did the Circuit Court of Appeals err in failing to affirm the judgment of the District Court?<sup>1</sup>

## **III. Summary of Argument.**

1. There was evidence before the Secretary of Labor to support the findings and each of them made in the warrant of deportation of this alien on August 14, 1934 (R. 64-65).

2. The Circuit Court of Appeals erred in its findings that there was no evidence to support the warrant of deportation issued against this alien on August 14, 1934.

3. The Circuit Court of Appeals erred in usurping the functions of the Secretary of Labor in evaluating the evidence which had been received and adjudged by the Secretary of Labor.

4. The Circuit Court of Appeals erred in assuming that the alien joined the Communist Party of America, prior to the 8th of November, 1932, in order to participate in said election, and the Court assumes that he did not join the Communist Party subsequent to November 8, 1932, for the propagation of the Communistic program.

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<sup>1</sup> The questions presented by the petitions for rehearing filed by the United States Attorney in the Circuit Court of Appeals are found in the Record at pages 74-76 and 80-81. The question presented by the Solicitor General in the petition for a writ of certiorari is found on page 2 of said petition. The questions presented in the brief of petitioner are found on pages 2-3 of said brief.

5. The Circuit Court of Appeals erred in its assumption that the statutes involved in this case were enacted to meet a situation growing out of the Russian revolution; and that conditions have so changed in the United States and Russia since then that previous decisions of the courts are no longer authoritative nor is strict enforcement of the statutes imperative.

6. The Circuit Court of Appeals erred in assuming the prerogatives of the Congress of the United States by judicially legislating that conditions in the United States and Russia have so changed since the passage of this Act as to abrogate said Act, and that aliens who were deportable under said Act in the 1920's are not deportable in the 1930's.

7. That counsel for petitioner have erroneously withdrawn from the consideration of this Court (Brief, p. 8) the second and third grounds for deportation, as set out by the Secretary of Labor in her warrant of deportation.

8. That counsel for petitioner have raised questions on behalf of the alien in its brief which are not properly presented by the Record; and have volunteered on behalf of Strecker and other aliens to create constitutional defenses and immunities and to defeat statutory enactments of Congress relating to immigration; and have failed to adequately present to this Court the inherent constitutional right of Congress to protect the United States against the dangers incident to the admission and residence within the United States of undesirable foreigners.

#### **IV. Statement.**

From the record filed herein the alien became a member of the Communist Party on November 15, 1932 (R. 11), although he testified on September 16, 1933, that he joined the Communist Party on November 1, 1932, in a negro church at



Little Rock, Arkansas (R. 42), later on January 23, 1934, he testified "I think it was one day before the Presidential election of 1932 (R: 12), (which would have been November 7, 1932). Judge Hutcheson, writing the opinion for the Circuit Court of Appeals, ignores the documentary evidence, showing that the alien was admitted to the Communist Party on November 15, 1932, and states in his opinion as follows:

"The evidence, and the only evidence relied on for the finding and order, is that *during the Presidential campaign of 1932*, when one Foster was running as the white, and one Ford as the colored candidate of the Communist Party of America, for President of the United States, appellant in November 1932 became a member of the Communist Party and accepted certain literature of the Communist Party for distribution. He testified that he was a member of the Communist Party of America until February, 1933, when he quit paying his dues, and that since that time he has not been a member." (Italics ours.)

The record further shows that the alien paid dues as a Communist through February 1933 (R. 36), and it is therefore assumed by Government counsel that Strecker ceased to be a member of the Communist Party by virtue of the fact that he did not pay any dues after February 1933—an assumption which was also indulged in by Judge Hutcheson. The petitioner, as a result of this false assumption, says in its brief (Note, p. 8):

"The Government does not rely upon the second and third grounds specified in the warrant. These allege that the respondent 'is' a member of the organizations described (R. 64-65). The Communist Party membership book of the respondent discloses that he joined the party in November 1932, and that he did not pay membership dues after February 1933 (R. 34-36). He testified that he bought only 'a few stamps' to put in the

book (R. 14; see also R. 6). The membership book states that 'Members who are four weeks in arrears in payment of dues cease to be members of the party in good standing,' and that 'Members who are three months in arrears shall be stricken from the rolls' (R. 38). It would, therefore, appear that respondent was stricken from the rolls of the party some time in May 1933. There was no evidence to the contrary. The warrant of arrest was not issued, however, until November 25, 1933 (R. 8), and the warrant of deportation was dated August 14, 1934 (R. 65). In view of the evidence the Government finds no ground for contending that at those times the respondent was a member of the described organizations. Cf. *Greco v. Haff*, 63 F. (2d) 863 (C. C. A. 9th)."

1. The mistake of Government counsel in thus withdrawing two of the four grounds of deportation from the consideration of the Court was probably due to their failure to note that the alien Strecker *filed* his petition for naturalization in the United States District Court at Little Rock, Ark., on March 1, 1933 (R. 39), and that he testified under oath on October 25, 1933, before Immigrant Inspector Carroll D. Paul (R. 30) that his purpose in filing his petition for citizenship in the United States was that he thought he would have more protection from the law if he was a citizen of the United States. When asked "Do you mean that section of the law which provides for the deportation of certain aliens?" he replied "I did not say that," whereupon he was asked "Isn't it a fact that your party leader advised you not to become too active in that you might be subject to deportation from the United States?" to which he replied "Something like that", and then in reply to the question "In the event the Communist Party of America attains sufficient power or proportion to be of service to you, will you pay your back dues and go along with them?" he said "Certainly (R. 34)." He further testified at this hearing that

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he had had no change of heart with respect to the Communist Party and still felt toward it as he did at the time of his initiation (R. 32).

From the foregoing the reasonable inference is that the alien ceased paying his dues on March 1, 1933, at the suggestion of his Communist leader, to avoid the danger of deportation.

His *continued membership* in the Communist Party after February, 1933, is further indicated by his purchase of bonds of the Soviet Republic "four months before this country established diplomatic relations with the Soviet Government" (Pet.'s Brief, p. 52). This purchase was made about July 16, 1933 (R. 43), because "It was represented to me that the United States Government's money would soon be worthless, or at best very cheap, and I thought it wise for my own protection to put my money into bonds of the present Russian Soviet Government. These bonds are paying interest in gold dollars American money." Strecker further testified (R. 43):

"I do not consider myself a Communist, because I am not paying dues to the Communist Party. I do not know whether we shall ever have a Communist system in the United States. I have read Marx's books and Marx states that sooner or later there will be a red revolution in every country in the world. I am trying to protect myself, and that is why I bought the bonds of the Russian Government. I do not know what is going to happen; I do not know how long I am going to live. If I knew when I was going to die, I would get me about four women and have a hell of a time before I die. If Communism comes in this country I will not be against it, because I have to go with the people, and whatever the people want I will have to go along with them."

Surely such evidence was conclusive proof of the first and fourth grounds of deportation and of "affiliation" with

the Communist Party (an averment negligently omitted from the warrant of deportation) and sufficient evidence to warrant the inference of continued membership in said party and to sustain the Secretary of Labor's findings.

The Circuit Court of Appeals further finds:

"The statute under which these proceedings were instituted was enacted in 1918 and amended in 1920, to meet a situation caused by the crisis in Russia in 1918 and 1919, and the propaganda following that crisis for the overthrow of governments by force. It was enacted to enable the United States to expel from its shores aliens seeking a footing here, to propagandize and proselytize for direct and violent action. The decisions of the Circuit Courts of Appeal in *Skeffington v. Katzeff*, 1 Cir. 277 Fed. 129; *Antolish v. Paul*, 7 Cir. 283 Fed. 957; *Ungar v. Seaman*, 8 Cir. 4 F. (2d) 80, on the authority of which it was held in *Ex Parte Vilarino*, 9 Cir. 50 F. (2d) 582; *Kjar v. Doak*, 7 Cir. 61 F. (2d) 566, upon which the appellee relies here, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience, and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute."

Apparently the Court made no historical study of the statute involved in this case. As early as 1903 (32 Stat. 1214-1221), the Congress of the United States excluded from admission aliens "who believe in or advocate the overthrow by force or violence of the Government of the United States." Certainly there was no Russian revolution at that time.

Again, on February 5, 1917, the Congress passed an Act (39 Stat. 889, c. 29), in part as follows:

"That \* \* \* any alien who at any time after entry shall be found advocating or teaching the unlaw-



ful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States . . . shall upon the warrant of the Secretary of Labor be taken into custody and deported."

This antedated the organization of the Soviet Republic of Russia. According to "Statesman's Yearbook, 1938" the abdication of the Russian Czar took place on March 15, 1917. It is my opinion that the primary cause for the passage of the Acts of February 5, 1917, and October 16, 1918, was the seditious activity and propaganda of the Industrial Workers of the World in the United States during the World War.

In *Guiney v. Bonham*, 261 Fed. 582 (9 C. C. A., decided December 1, 1919), the alien Guiney, a member of the Industrial Workers of the World, was deported under the Act of 1917.

The Circuit Court of Appeals further erred in its failure to grasp an elemental distinction between the rights of aliens and of native-born citizens of the United States. A native-born citizen may have and express beliefs which an alien may neither have when such alien enters the United States, nor acquire after coming here under penalty of deportation.

The Circuit Court of Appeals committed three other errors in its decision:

1. It assumes to weigh the evidence for and against the alien, disregarding that which is unfavorable to the alien upon which the Secretary of Labor hypothecated the warrant of deportation, and accepting as true the testimony which is favorable to the alien; and

2. The Circuit Court of Appeals held that

"The decisions of the Circuit Courts of Appeal . . . upon which the appellee relies here, that mem-

*bership in the Communist Party of America alone is sufficient to warrant deportation* were rendered under the Russian experience and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute." (Italics ours.)

No court ever held "that membership in the Communist Party of America alone is sufficient to warrant deportation." It has always been held by all of the courts that membership or affiliation "with any organization, association, society, or group that believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States" constituted grounds for deportation, and that sufficient evidence had been offered in these cases to show that the Communist Party was such an organization.

3. The Circuit Court of Appeals further holds that Congress passed an Act in 1920, which Congress only meant to be enforced at that time, because of the peculiar conditions, but which Congress does not mean should be enforced at this time, because of changed conditions, which the court explains as follows:

"Much water, socially and politically, has gone under the bridge since 1920. Russia itself is more vigorously organized than almost any other country in the world to prohibit and suppress those who teach and preach the overthrow of government by force."

When conditions have so changed that Congress is disposed to repeal its immigration laws, it has the power to do so, but the Circuit Court of Appeals for the Fifth Circuit has no such power, regardless of its views on "Pecksniffian righteousness" and the "cause of liberalism."

The righteousness or unrighteousness of our immigration laws are not matters of the courts' discretion. It is not for the courts of the United States to decide what aliens may enter the United States, nor what aliens shall be deported from the United States. That is an exclusive prerogative of the Congress of the United States.

Since the decision by Mr. Justice Gray in 1893, in the case of *Fong Yue Ting v. U. S.*, 149 U. S. 698, 720, 13 Sup. Ct. 1016, 37 L. Ed. 905, the right of Congress to exclude and deport aliens, even in contravention of treaties, has been settled. In that case this Court said:

"In the recent case of *Ekiu v. U. S.*, 142 U. S. 651, 659, the Court, in sustaining the action of the executive department putting in force an Act of Congress for the exclusion of aliens, said: 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe' . . . ."

"In our jurisdiction, it is well settled that the provisions of an Act of Congress passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty."

Even when the Acts of Congress work a manifest hardship on aliens *who are innocent of any wrongdoing*, still the enactments of Congress and not the judgment of the Court must prevail.

In *Fong Yue Ting v. U. S.*, *supra*, the Court says:

"In the case of *Chae Chan Ping v. United States*, already often referred to, a Chinese laborer, who had resided in San Francisco from 1875 until June 2, 1887, when he left that port for China, having in his posses-

sion a certificate issued to him on that day by the collector of customs, according to the Act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the Act of October 1, 1888, above cited. It was strongly contended in his behalf, that by his residence in the United States for twelve years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by Congress; that he had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer, contained in the acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that, as applied to him, the Act of 1888 was unconstitutional, as being a bill of attainder and an *ex post facto* law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence. The contention was thus summed up at the beginning of the opinion: 'The validity of the Act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress.' 130 U. S. 584-589 (32: 1070).

Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector in refusing him permission to land was lawful; \* \* \*

Counsel for the Government herein have raised several questions which are outside of the record on behalf of this alien and others. On page 20 of their brief they say:

"While respondent did not specifically raise in his petition for habeas corpus (R. 1-2), or in his assign-

ment of errors below (R. 67-69), or in his brief in opposition to certiorari, the question of the constitutional right of freedom of speech and of assembly under the First Amendment of the Federal Constitution, that question may be deemed by the Court to be pertinent with respect to this question of statutory construction. Cf. *Herndon v. Lowry*, 301 U. S. 242. \* \* \*

"It was pointed out in that case (*Herndon v. Lowry*, *supra*) that 'peaceful agitation for a change of our form of government is within the guaranteed liberty of speech' (p. 259). In that case this Court set aside, on constitutional grounds, a conviction under a criminal insurrection statute of Georgia which made it an offense to advocate violence against the state whether the violence was intended to result immediately or 'at any time within which he (the defendant) might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce' (pp. 254-255). \* \* \*

As a Friend of the Court, I urge that this issue which the Solicitor General and his associates have thus sought to inject into this case, is a spurious one, and that the authority which they have cited in support thereof, to-wit, *Herndon v. Lowry*, 301 U. S. 242, is not applicable for the reason that in the *Herndon* case the Supreme Court was deciding a question involving the constitutional rights of a native-born citizen and not of an alien. In support of my contention that aliens do not enjoy, and never have enjoyed, equal rights with citizens of the United States under the Constitution and laws of the United States, as interpreted by this Court, your attention is directed to the opinion of Mr. Justice Brandeis in the case of *Ng Fung Ho v. White*, 259 U. S. 276:

"As to Gin Sang Get and Gin Sang Mo, a constitutional question also is presented. Each claims to be a foreign-born son of a native-born citizen; and hence, under Section 1993 of the Revised Statutes to be him-



self a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial proceeding. *U. S. v. Ju Toy*, 198 U. S. 253; *Tang Tun v. Edsell*, 223 U. S. 673. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously.

\* \* \* The constitutional question presented as to them is, may a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void *ab initio*. *U. S. v. Sing Tuck*, 194 U. S. 161. \* \* \*

To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow v. U. S.* 208 U. S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivations without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law \* \* \*

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States, but it does not follow that they should be discharged \* \* \*. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship. As to Ng Fung Ho and Ng Youen Shew the judgment of the Circuit Court of Appeals is affirmed."

In *Herndon v. Lowry*, *supra*, the issue was the constitutionality of a State statute involving the criminal prosecution of a citizen of the United States. This Court has repeatedly held that deportation is a civil and not a criminal

procedure, and therefore that an alien is not entitled to the constitutional safeguards involved in a criminal prosecution.

On page 22 of their brief Government counsel say:

"It would appear to be settled, therefore, that with respect to aliens while resident here, the power of Congress is subject to the limitations of the Constitution, and that an appropriate basis must be found for subordinating the rights of persons under the First Amendment to the exercise of Congressional control. That justification is ordinarily to be sought in the protection of the Government against the danger of overthrow by force and violence. The Herndon case, *supra*, suggests that the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted.

"The question whether a similar standard is applicable in relation to deportation is one which has not been squarely passed upon by this Court. \* \* \*"

It would appear from the foregoing quotations that counsel for the Government strongly suggest that even an alien may have the right to "peaceful agitation for a change of our form of Government \* \* \* within the guaranteed liberty of speech", and that the "power of Congress is subject to the limitations of the Constitution" with respect to legislative concern "or danger of overthrow by force and violence", and that "the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted."

This Court has repeatedly held that Congress was not restricted in any such manner as suggested by Government counsel. In the case of *Turner v. Williams*, 194 U. S. 279, 48 L. Ed. 979, 985, this Court held:

"And if the judgment of the board and the Secretary was that Turner came within the Act as thus construed, we cannot hold as matter of law that there was no evidence on which that conclusion could be rested. Even if Turner, though he did not so state to the board, only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating, not simply for the benefit of workingmen, who are justly entitled to repel the charge of desiring the destruction of law and order, but 'at any rate, as an anarchist', the universal strike to which he referred . . . we cannot say that the inference was unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end.

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government."

From the foregoing questions which have been raised by Government counsel outside of the record, and were not urged by Strecker's counsel, it appears that the Solicitor General and his associates; and Mr. Reilly, Solicitor of the Department of Labor, are seeking a declaratory judgment in favor of aliens, and an enlargement of their constitutional rights by judicial decree, contrary to the statutes of the United States in such cases made and provided.

This volunteer service by the legal staffs of the Departments of Justice and Labor, on behalf of an alien, such as the record shows Strecker to be, induces a reasonable in-

ference that the ultimate object of this appeal is to elicit a judgment from this Court which will protect other aliens against whom deportation proceedings are now pending.

Although counsel for the Government owe a duty to enforce the laws of the United States, they have chosen rather to suggest to this Court rights which the alien does not urge.

When this Court reads the record it will be found that the alien Strecker is no lily of the valley, nor is he an innocent victim of Government perfidy. On the contrary he has been most gently dealt with and has, through the negligence or liberality of the Government been enabled to protract his deportation for over four years.

WHEREFORE, I respectfully and earnestly pray that this Court terminate the further stay of this undesirable alien within the United States by reversing *in toto* the decision of the Circuit Court of Appeals herein.

MARTIN DIES, M. C.,  
*Attorney.*

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1938.

No. 330.

**EUGENE KESSLER**, District Director of Immigration  
and Naturalization,

*Petitioner,*

v.

**JOSEPH GEORGE STRECKER.**

**BRIEF ON BEHALF OF THE COMMUNIST PARTY OF  
THE UNITED STATES, AMICUS CURIAE.**

✓  
**JOSEPH R. BRODSKY,**

On behalf of the Communist Party

of the United States,

*Amicus Curiae.*



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**Supreme Court of the United States**

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EUGENE KESSLER, District Director of  
Immigration and Naturalization,

*Petitioner,*

against

JOSEPH GEORGE STRECKER.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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**BRIEF ON BEHALF OF THE COMMUNIST PARTY OF  
THE UNITED STATES, AMICUS CURIAE.**

---

**Statement.**

The Government seeks to sustain the deportation of the respondent upon the following grounds:

1. That there was evidence in the record before the Secretary of Labor to support the finding in the warrant of deportation that respondent, after entry, became a member

of an organization that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States (Government's brief, page 15, Argument I).

2. That there was evidence in the record before the Secretary of Labor to support the finding in the deportation warrant that respondent believes in and teaches the overthrow by force and violence of the Government of the United States (Government's brief, p. 50, Argument II).

The organization referred to in Argument I (*supra*) is the Communist Party of the United States, and the Government contends that said party "is a revolutionary party which seeks the overthrow through violent, revolutionary action, when the occasion seems propitious, of the Governments of so-called capitalistic-imperialistic countries, of which America is regarded as one" (Government's brief, p. 41).

Likewise with reference to Argument II (*supra*), the Government places great stress on the membership of the respondent in the Communist Party of the United States as indicative of his personal beliefs (Government's brief, pp. 52-53).

Although the question of the personal beliefs of respondent was not raised in the petition for certiorari, the Government nevertheless urges that the Court consider the point on this appeal.

Assuming *arguendo* that this point is before the Court, then again the tenets of the Communist Party of the United States become important in determining the personal beliefs of the respondent, since the gravamen of the charge is in reality membership in that party.

The Communist Party of the United States, appearing *amicus curiae*, therefore deems it pertinent and important to submit for the information of this Court the following documents:

1) Constitution and By-laws of the Communist Party of the United States;

2) "What Is Communism?" by Earl Browder, Chapter XIV—"Force and Violence" (pp. 124-130);

3) "The People's Front", by Earl Browder, Part II, Chap. III—"On Church, Home and Violence" (pp. 197-203);

4) Statement of Earl Browder, General Secretary of Communist Party, U.S.A., to the McNaboe Committee, June 29, 1938.

Should the Government urge that said exhibits are not entitled to consideration, since they are not contained in the record of this case, Counsel wishes to point out that the Government has likewise presented in its brief, as proof of its contention that the Communist Party of the United States advocates the overthrow of government by force and violence, matter not contained in the record. If this matter is regarded as properly before the Court, it is submitted that the documents appended to this brief should likewise be considered.

Consideration of the exhibits herein contained, which consist of (a) the Constitution and By-laws of the Communist Party of the United States, which is its authoritative statement of object and purpose of existence, and (b) of pronouncements of its highest ranking officer, to wit, its general secretary, made in his official capacity, prove conclusively that the Communist Party of the United States does not either believe in, advise, teach or advocate the overthrow by force or violence of the Government of the United States.

**CONCLUSION.**

**The judgment of the Court below that the evidence was insufficient should be sustained.**

Respectfully submitted,

**JOSEPH R. BRODSKY,**  
On behalf of the Communist Party  
of the United States,  
*Amicus Curiae.*

**EXHIBITS****Constitution and By-laws of the Communist Party.****THE CONSTITUTION AND BY-LAWS**

of the

**COMMUNIST PARTY**

of the

**UNITED STATES OF AMERICA**

*This Constitution was unanimously adopted by the Tenth National Convention of the Communist Party of the U.S.A., in New York, May 27 to 31, 1938, after two months of pre-Convention discussion in every Branch of the Party. In its final form it was subsequently ratified by the Party membership after discussion in the Branches of the Party.*

**CONSTITUTION****PREAMBLE**

**THE COMMUNIST PARTY** of the United States of America is a working class political party carrying forward today the traditions of Jefferson, Paine, Jackson, and Lincoln, and of the Declaration of Independence; it upholds the achievements of democracy, the right of "life, liberty, and the pursuit of happiness," and defends the United States Constitution against its reactionary enemies who would destroy democracy and all popular liberties; it is devoted to defense of the immediate interests of workers, farmers, and all toilers against capitalist exploitation, and to preparation of the working class for its historic mission to unite and lead the American people to extend these demo-



*Constitution and By-laws of the Communist Party  
of the United States.*

cratic principles to their necessary and logical conclusions:

By establishing common ownership of the national economy, through a government of the people, by the people, and for the people; the abolition of all exploitation of man by man, nation by nation, and race by race, and thereby the abolition of class divisions in society; that is, by the establishment of socialism, according to the scientific principles enunciated by the greatest teachers of mankind, Marx, Engels, Lenin, and Stalin, embodied in the Communist International; and the free cooperation of the American people with those of other lands, striving toward a world without oppression and war, a world brotherhood of man.

To this end, the Communist Party of the United States of America establishes the basic laws of its organization in the following Constitution.

ARTICLE I

*Name*

The name of this organization shall be the COMMUNIST PARTY OF THE UNITED STATES OF AMERICA.

ARTICLE II

*Emblem*

The emblem of the party shall be the crossed hammer and sickle, representing the unity of worker and farmer, with a circular inscription having at the top "Communist Party of the U.S.A." and in the lower part "Affiliated to the Communist International."

*Constitution and By-laws of the Communist Party  
of the United States.*

**ARTICLE III**

***Membership***

*Section 1.* Any person, eighteen years of age or more, regardless of race, sex, color, religious belief, or nationality, who is a citizen or who declares his intention of becoming a citizen of the United States, and whose loyalty to the working class is unquestioned, shall be eligible for membership.

*Section 2.* A Party member is one who accepts the Party program, attends the regular meetings of the membership Branch of his place of work or of his territory or trade, who pays dues regularly and is active in Party work.

*Section 3.* An applicant for membership shall sign an application card which shall be endorsed by at least two members of the Communist Party. Applications are subject to discussion and decision by the basic organization of the Party (shop, industrial, neighborhood Branch) to which the application is presented. After the applicant is accepted by a majority vote of the membership of the Branch present at a regular meeting he shall publicly pledge as follows:

"I pledge firm loyalty to the best interests of the working class and full devotion to all progressive movements of the people. I pledge to work actively for the preservation and extension of democracy and peace, for the defeat of fascism and all forms of national oppression, for equal rights to the Negro people and for the establishment of socialism. For this purpose, I solemnly pledge to remain true to the prin-

*Constitution and By-laws of the Communist Party  
of the United States.*

ciples of the Communist Party to maintain its unity of purpose and action, and to work to the best of my ability to fulfil its program."

*Section 4.* There shall be no members-at-large without special permission of the National or State Committee.

*Section 5.* Party members two months in arrears in payment of dues cease to be members of the Party in good standing, and must be informed thereof.

*Section 6.* Members who are four months in arrears shall be stricken from the Party rolls. Every member three months in arrears shall be officially informed of this provision, and a personal effort shall be made to bring such member into good standing. However, if a member who for these reasons has been stricken from the rolls applies for readmission within six months, he may, on the approval of the next higher Party committee, be permitted to pay up his back dues and keep his standing as an old member.

#### ARTICLE IV

##### *Initiation and Dues*

*Section 1.* The initiation fee for an employed person shall be 50 cents and for an unemployed person 10 cents.

*Section 2.* Dues shall be paid every month according to rates fixed by the National Party Convention.

*Section 3.* The income from dues shall be distributed to the various Party organizations as follows:

*Constitution and By-laws of the Communist Party  
of the United States.*

- a. 25 per cent to the Branch.
- b. 35 per cent to the National Office.
- c. The remaining 40 per cent shall be distributed among the respective State, County, City and Section Organizations in accordance with decisions of the State Conventions.

*Section 4.* Fifty per cent of the initiation fee shall be sent to the National Committee and 50 per cent shall remain with the State Organization.

ARTICLE V

*International Solidarity and Assessment*

*Section 1.* Every four months, all members of the Party shall pay an assessment equal to the average dues payment per month for the previous four months, for an International Solidarity Fund. This money shall be used by the National Committee exclusively to aid our brother Communist Parties in other countries suffering from fascist and military reaction.

*Section 2.* All local or district assessments are prohibited, except by special permission of the National Committee. Special assessments may be levied by the National Convention or the National Committee. No member shall be considered in good standing unless he purchases stamps for such special assessments.

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ARTICLE VI

*Rights and Duties of Members*

*Section 1.* The Communist Party of the U.S.A. upholds the democratic achievements of the American people. It opposes with all its power any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy whereby the majority of the American people have obtained power to determine their own destiny in any degree. The Communist Party of the U.S.A., standing unqualifiedly for the right of the majority to direct the destinies of our country, will fight with all its strength against any and every effort, whether it comes from abroad or from within, to impose upon our people the arbitrary will of any selfish minority group or party or clique or conspiracy.

*Section 2.* Every member of the Party who is in good standing has not only the right, but the duty, to participate in the making of the policies of the Party and in the election of its leading committees, in a manner provided for in the Constitution.

*Section 3.* In matters of state or local nature, the Party organizations have the right to exercise full initiative and to make decisions within the limits of the general policies and decisions of the Party.

*Section 4.* After thorough discussion, the majority vote decides the policy of the Party, and the minority is duty-bound to carry out the decision.

*Section 5.* Party members disagreeing with any decision of a Party organization or committee have the right to



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appeal that decision to the next higher body, and may carry the appeal to the highest bodies of the Communist Party of the U.S.A., its National Committee and the National Convention. Decisions of the National Convention are final. While the appeal is pending, the decision must nevertheless be carried out by every member of the Party.

*Section 6.* In pre-Convention periods, individual Party members and delegates to the Convention shall have unrestricted right of discussion on any question of Party policy and tactics and the work and future composition of the leading committees.

*Section 7.* The decisions of the Convention shall be final and every Party member and Party organization shall be duty-bound to recognize the authority of the Convention decisions and the leadership elected by it.

*Section 8.* All Party members in mass organizations (trade unions, farm and fraternal organizations, etc.), shall cooperate to promote and strengthen the given organization and shall abide by the democratic decisions of these organizations.

*Section 9.* It shall be the duty of Party members to explain the mass policies of the Party and the principles of socialism.

*Section 10.* All Party members who are eligible shall be required to belong to their respective trade unions.

*Section 11.* All officers and leading committees of the Party from the Branch Executive Committee up to the

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highest committees are elected either directly by the membership or through their elected delegates. Every committee must report regularly on its activities to its Party organization.

*Section 12.* Any Party officer may be removed at any time from his position by a majority vote of the body which elected him, or by the body to which he is responsible, with the approval of the National Committee.

*Section 13.* Requests for release of a Party member from responsible posts may be granted only by the Party organization which elected him, or to which he is responsible, in consultation with the next higher committee.

*Section 14.* No Party member shall have personal or political relationship with confirmed Trotskyites, Lovestoneites, or other known enemies of the Party and of the working class.

*Section 15.* All Party members eligible shall register and vote in the elections for all public offices.

## ARTICLE VII

### *Structure of the Party*

*Section 1.* The basic organizations of the Communist Party of the U.S.A. are the shop, industrial and territorial Branches.

The Executive Committee of the Branch shall be elected once a year by the membership.

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**Section 2.** The Section Organization shall comprise all Branches in a given territory of the city or state. The Section territory shall be defined by the higher Party committee and shall cover one or more complete political divisions of the city or state.

The highest body of the Section Organization is the Section Convention, or special annual Council meeting, called for the election of officers, which shall convene every year. The Section Convention or special Council meeting discusses and decides on policy and elects delegates to the higher Convention.

Between Section Conventions, the highest Party body in the Section Organization is the Section Council, composed of delegates elected proportionately from each Branch for a period of one year. Where no Section Council exists, the highest Party body is the Section Committee, elected by a majority vote of the Section Convention, which also elects the Section Organizer.

The Section Council or Section Committee may elect a Section Executive Committee which is responsible to the body that elected it. Non-members of the Section Council may be elected to the Executive Committee only with the approval of the next higher committee.

**Section 3.** In localities where there is more than one Section Organization, a City or County Council or Committee may be formed in accordance with the By-Laws.

**Section 4.** The State Organization shall comprise all Party organizations in one state.

The highest body of the State Organization is the State Convention, which shall convene every two years, and shall be composed of delegates elected by the Conventions of the

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subdivisions of the Party or Branches in the state. The delegates are elected on the basis of numerical strength.

A State Committee of regular and alternate members shall be elected at the State Convention with full power to carry out the decisions of the Convention and conduct the activities of the State Organization until the next State Convention.

The State Committee may elect from among its members an Executive Committee, which shall be responsible to the State Committee.

Special State Conventions may be called either by a majority vote of the State Committee, or upon written request of the Branches representing one-third of the membership of the state, with the approval of the National Committee.

*Section 5.* District Organizations may be established by the National Committee, covering two or more states. In such cases the State Committees shall be under the jurisdiction of the District Committees, elected by and representing the Party organizations of the states composing these Districts. The rules of convening District Conventions and the election of leading committees shall be the same as those provided for the State Organization.

## ARTICLE VIII

### *National Organization*

*Section 1.* The supreme authority in the Communist Party of the U.S.A. is the National Convention. Regular National Conventions shall be held every two years. Only such a National Convention is authorized to make political

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and organizational decisions binding upon the entire Party and its membership, except as provided in Article VIII, Section 6.

*Section 2.* The National Convention shall be composed of delegates elected by the State and District Conventions. The delegates are elected on the basis of numerical strength of the State Organizations. The basis for representation shall be determined by the National Committee.

*Section 3.* For two months prior to the Convention, discussions shall take place in all Party organizations on the main resolutions and problems coming before the Convention. During this discussion all Party organizations have the right and duty to adopt resolutions and amendments to the Draft Resolutions of the National Committee for consideration at the Convention.

*Section 4.* The National Convention elects the National Committee, a National Chairman and General Secretary by majority vote. The National Committee shall be composed of regular and alternate members. The alternate members shall have voice but no vote.

*Section 5.* The size of the National Committee shall be decided upon by each National Convention of the Party. Members of the National Committee must have been active members of the Party for at least three years.

*Section 6.* The National Committee is the highest authority of the Party between National Conventions, and is responsible for enforcing the Constitution and securing the execution of the general policies adopted by the democratically elected delegates in the National Convention as-



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sembled. The National Committee represents the Party as a whole, and has the right to make decisions with full authority on any problem facing the Party between Conventions. The National Committee organizes and supervises its various departments and committees; conducts all the political and organizational work of the Party; appoints or removes the editors of its press, who work under its leadership and control; organizes and guides all undertakings of importance for the entire Party; distributes the Party forces and controls the central treasury. The National Committee, by majority vote of its members, may call special State or National Conventions. The National Committee shall submit a certified, audited financial report to each National Convention.

*Section 7.* The National Committee elects from among its members a Political Committee and such additional secretaries and such departments and committees as may be considered necessary for most efficient work. The Political Committee is charged with the responsibility of carrying out the decisions and the work of the National Committee between its full sessions. It is responsible for all its decisions to the National Committee. The size of the Political Committee shall be decided upon by majority vote of the National Committee.

Members of the Political Committee and editors of the central Party organs must have been active members of the Party for not less than five years.

The National Committee shall meet at least once in four months.

The Political Committee of the National Committee shall meet weekly.

The National Committee may, when it deems it necessary, call Party Conferences. The National Committee shall de-

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side the basis of attendance at such Conferences. Such Conferences shall be consultative bodies auxiliary to the National Committee.

ARTICLE IX

*National Control Commission*

*Section 1.* For the purpose of maintaining and strengthening Party unity and discipline, and of supervising the audits of the financial books and records of the National Committee of the Party and its enterprises, the National Committee elects a National Control Commission, consisting of the most exemplary Party members, each of whom shall have been an active Party member for a least five years. The size of the National Control Commission shall be determined by the National Committee.

*Section 2.* On various disciplinary cases, such as those concerning violations of Party unity, discipline or ethics, or concerning lack of class vigilance and Communist firmness in facing the class enemy, or concerning spies, swindlers, double-dealers and other agents of the class enemy—the National Control Commission shall be charged with making investigations and decisions, either on appeals against the decisions of lower Party bodies, or on cases which are referred to it by the National Committee, or on cases which the National Control Commission itself deems necessary to take up directly.

*Section 3.* The decisions of the National Control Commission shall go into effect as soon as their acceptance by the National Committee or its Political Committee is assured.

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*Section 4.* Members of the National Control Commission shall have the right to participate in the sessions of the National Committee with voice but no vote.

*Section 5.* Meetings of the National Control Commission shall take place at least once every month.

ARTICLE X

*Disciplinary Procedure*

*Section 1.* Breaches of Party discipline by individual members, financial irregularities, as well as any conduct or action detrimental to the Party's prestige and influence among the working masses and harmful to the best interests of the Party, may be punished by censure, public censure, removal from responsible posts, and by expulsion from the Party. Breaches of discipline by Party Committees may be punished by removal of the Committee by the next higher Party Committee, which shall then conduct new elections.

*Section 2.* Charges against individual members may be made by any person—Party or non-Party—in writing, to the Branches of the Party or to any leading committee. The Party Branch shall have the right to decide on any disciplinary measure, including expulsion. Such action is subject to final approval by the State Committee.

*Section 3.* The Section, State, and National Committees and the National Control Commission have the right to hear and take disciplinary action against any individual member or organization under their jurisdiction.

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*Section 4.* All parties concerned shall have the fullest right to appear, to bring witnesses and to testify before the Party organization. The member punished shall have the right to appeal any disciplinary decision to the higher committees up to the National Convention of the Party.

*Section 5.* Party members found to be strikebreakers, degenerates, habitual drunkards, betrayers of Party confidence, provocateurs, advocates of terrorism and violence as a method of Party procedure, or members whose actions are detrimental to the Party and the working class, shall be summarily dismissed from the positions of responsibility, expelled from the Party and exposed before the general public.

ARTICLE XI

*Affiliation*

The Communist Party of the U.S.A. is affiliated with its fraternal Communist Parties of other lands through the Communist International and participates in International Congresses, through its National Committee. Resolutions and decisions of International Congresses shall be considered and acted upon by the supreme authority of the Communist Party of the U.S.A., the National Convention, or between Conventions, by the National Committee.

ARTICLE XII

*Amending the Constitution*

*Section 1.* This Constitution and By-Laws may be amended as follows: (a) by decision of a majority of the

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voting delegates present at the National Convention, provided the proposed amendment has been published in the Party press or Discussion Bulletins of the National Committee at least thirty days prior to the Convention; (b) by the National Committee for the purpose of complying with any law of any state or of the United States or whenever any provisions of this Constitution and By-Laws conflict with any such law. Such amendments made by the National Committee shall be published in the Party press or Discussion Bulletins of the National Committee and shall remain in full force and effect until acted upon by the National Convention.

*Section 2.* Any amendment submitted by a State Committee or State Convention within the time provided for shall be printed in the Party press..

### ARTICLE XIII

*Section 1.* By-Laws shall be adopted, based on this Constitution, for the purpose of establishing uniform rules and procedure for the proper functioning of the Party organizations. By-Laws may be adopted or changed by majority vote of the National Convention, or between Conventions by majority vote of the National Committee.

*Section 2.* State By-Laws not in conflict with the National Constitution and By-Laws may be adopted or changed by majority vote of the State Convention or, between Conventions, by majority vote of the State Committee.



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ARTICLE XIV

*Charters*

The National Committee shall issue Charters to State or District Organizations and at the request of the respective State Organizations, to County and City Organizations, defining the territory over which they have jurisdiction and authority.

RULES AND BY-LAWS

THE FOLLOWING are the Rules and By-Laws adopted by the Communist Party of the United States of America, in accordance with its Constitution, for the purpose of carrying out the principles, rights and duties as established in the Constitution in a uniform manner in all Party organizations.

*Basic Organizations*

The basic organizations of the Communist Party of the U.S.A. are the shop, territorial and industrial Branches. A shop Branch consists of those Party members who are employed in the same place of employment. Shop Branches shall be organized in every factory, shop, mine, ship, dock, office, etc., where there is a sufficient number of Party members, but no less than seven.

A territorial Branch consists of members of the Party living in the same neighborhood or territory. Territorial Branches shall be organized on the basis of the political division of the city or town (assembly district, ward, precinct, election district, town or township, etc.).

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Industrial Branches may be organized and shall consist of Party members employed in the same trade or industry and shall be composed of those Party members who are employed in places where shop Branches have not yet been formed. Shop Branches shall be organized wherever possible.

Every Branch of the Party shall elect an Executive Committee, which shall consist of at least the following officers: chairman, treasurer, educational director, membership director. There may be a recording secretary whose functions may be filled by one of the other officers. The size of the Executive Committee shall be determined by the size of the Branch, but shall not be less than four.

The Executive Committee has the duty of preparing the agenda and proposals for the membership meeting, administering and executing the decisions of the membership and the higher Party committee, and, between Branch meetings, of making decisions concerning matters which require immediate action. The Executive Committee of the Branch shall report regularly on its work, which shall be subject to review and action by the membership.

Regular election of Branch officers shall take place yearly, but not more than twice a year. All officers shall be elected by majority vote of the membership at a specially designated meeting of which the whole membership shall be notified. Officers may be replaced by majority vote of the Branch membership at any time, with the approval of the higher Party committee.

Financial statements shall be submitted to the Branch by the Executive Committee at least quarterly.

The order of business at the Branch meeting shall include the following:

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1. Reading of minutes of previous meeting;
2. Dues payments and initiation of new members;
3. Report of Executive Committee:
  - a. Check-up on decisions (old business);
  - b. Assignments and tasks, reports on communications, literature and press (new business);
4. Good and welfare;
5. Regular educational discussion (educational discussion may be moved to any point on the order of business).

Collections within Party organizations in a given territory may be made only with the approval of the next higher body.

One-third of the Branch membership shall constitute a quorum.

Branches shall meet at least once every two weeks.

*Section Organizations*

Delegates to the Section Convention or Council shall be elected by all Branches in proportion to their membership. The basis of representation shall be decided upon by the Section Committee in consultation with the higher Party Committee.

Any delegate to the Section Council may be recalled by a majority vote of his Branch. The Section Council meets regularly once a month.

The Section Council shall make a report at least once in three months to the general membership meeting of the

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**Section.** All Party members residing in the territory may be invited to these meetings.

The Section Council shall submit financial reports to the Branches and to the higher Party Committee at least once in three months.

*City or County Organizations*

In cities where there is more than one Section Organization, a City Council may be formed by the election of delegates either from the Section Councils or directly from the Branches. The role of this form of organization is to coordinate and guide the work on a citywide scale, and actively participate in or supervise Party activity in all public elections and civic affairs within its territory.

The City Council elects from among its members a City Executive Committee with the same rights and duties on a citywide scale as the Section Executive Committee has on a Sectionwide scale.

The State Committee may form County Councils with the same rights and duties on a county scale as the City Council has on a city scale.

The structure of the County Council shall be the same as of the City Council.

*State or District Organizations*

For two months prior to the State Convention, discussion shall take place in all Party organizations on the main resolutions and problems coming before the Convention. During this discussion, all Party organizations have the right and duty to adopt resolutions and amendments to the Draft Resolutions of the State Committee, for consideration at the Convention.

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Only members who are at least two years in the Party shall be eligible for elections to the State Committee. Exceptions may be made only by State or National Conventions. The size of the State Committee shall be decided upon by the Convention, in consultation with the National Committee.

The State Committee shall meet at least once every two months. It shall elect from among its members an Executive Committee to function with full power, which shall be responsible to the State Committee.

The State Committee, by a majority vote of its members, may replace any regular member who is unable to serve because of sickness or other assignment, or who is removed from office. New regular members shall be chosen from among the alternate members of the State Committee.

An auditing committee, elected by the State Committee, shall examine the books of the State Financial Secretary once every month. A Certified Public-Accountant shall audit these books at least once a year, and his report shall be presented to the State Committee and Conventions.

Special State Conventions may be called by a majority vote of the State Committee, or by the National Committee.

Upon the written request of Branches representing one-third of the membership of the State Organization, the State Committee shall call a special State Convention.

The call for a special Convention shall be subject to the approval of the National Committee.

The State Committee shall have the power to establish an official organ with the approval of the National Committee.

The State Committee shall conduct or supervise Party activity in all public elections and statewide public affairs within the state.



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In states having more than one thousand members, the State Committee shall appoint a Disciplinary Committee with the task of hearing disciplinary cases, and reporting its findings and recommendations to the State Committee. In states with less than one thousand members, a Committee may be appointed if it is considered necessary.

The rules governing the organization and functioning of District Organization shall be the same as those provided for the State Organizations.

*Qualifications for Delegates to Conventions*

Delegates to the State Conventions must be in good standing and have been members of the Party for at least one year.

Delegates to the National Convention must be in good standing and have been members of the Party for at least two years.

In special cases, the latter qualification (length of time in Party) may be waived, but only with the approval of the leading committee involved (National Committee for the National Convention, State Committee for the State Convention).

*Membership*

It is within the provision of Article III, Section 1 of the Constitution that the following are eligible to membership in the Communist Party:

- a. Persons who, by some present unjust and undemocratic laws, are excluded from citizenship and barred from legally declaring their intentions of becoming citizens;

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- b. Students and others temporarily residing in the country;
- c. All persons coming from countries contiguous to the United States, engaged in migratory work, and temporarily in the country.

*Rate of Dues*

Dues shall be paid every month according to the following rates:

- a. Housewives, unemployed, and all members earning up to \$47.00 a month, shall pay 10 cents a month.
- b. All members earning from \$47.01 to \$80.00 a month inclusive shall pay 25 cents a month.
- c. All members earning from \$80.01 to \$112.00 a month inclusive shall pay 50 cents a month.
- d. All members earning from \$112.01 to \$150.00 a month inclusive shall pay \$1.00 a month.
- e. Members earning more than \$160.00 per month shall pay, besides the regular \$1.00 dues, additional dues at the rate of 50 cents for each additional \$10.00 or fraction thereof.

All dues payments must be acknowledged in the membership book by dues stamps, issued by the National Committee.

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*Transfers and Leaves of Absence*

Members who move from one neighborhood, shop or industry to another and have to go from one Branch to another, shall obtain transfers from their Branches. No member shall be accepted by the new Branch without a properly filled out transfer card. Before receiving transfers, members shall be in good standing and have paid up all other financial obligations to their Branches. If a member transfers from one Section or City Organization to another, a duplicate transfer card shall be transmitted through the State or District Committee. If a member transfers from one State or District to another, this shall be recorded in the membership book, and a duplicate transfer card shall be sent through the National Committee.

No member has the right to take a leave of absence without the permission of his Branch. Leaves of absence not exceeding one month may be granted by the Branch. An extended leave of absence, upon the recommendation of the Branch, shall be acted upon by the next higher committee of the Party. Before a leave of absence is given the member shall pay up dues, and settle his financial obligations up to and including the end of the leave of absence period.

*Readmittance*

Expelled members applying for readmittance must submit a written statement and their applications may not be finally acted upon except with the approval of the National Control Commission.

Former members whose membership has lapsed must submit a written statement on application for readmission, to be finally acted upon by the respective State Committees.

"What is Communism", by Earl Browder, Chap. XIV  
(pp. 124-130).

### FORCE AND VIOLENCE\*

It is obvious to everyone that the capitalist system is breaking down, that millions of people are condemned to a life of slow starvation because the capitalists can profitably operate only a small part of the existing means of production. But it would be a fatal mistake to conclude that the capitalist social order will simply collapse of its own weight, or that the capitalists will peacefully surrender their present power and then all of us will join together in the building of a new social system. No ruling class group has ever behaved in such peaceful fashion. As the crisis becomes worse, the more desperately will the capitalists cling to their property and their power, the more murderous will become their attacks on the masses of the people. It must be emphasized that capitalism will not simply come to an end; it can only be ended by the organ-

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\*At the Ninth Convention of the Communist Party, held June 24-28, 1936, the following resolution was adopted:

"The Communist Party must use the opportunity of this election campaign to smash once and for all the superstition, which has been embodied in a maze of court decisions having the force of law, that our Party is an advocate of force and violence, that it is subject to laws (Federal immigration laws, state 'criminal syndicalism' laws) directed against such advocacy. The Communist Party is not a conspirative organization, it is an open revolutionary party, continuing the traditions of 1776 and 1861; it is the only organization that is really entitled by its program and work to designate itself as 'sons and daughters of the American revolution'. Communists are not anarchists, not terrorists. The Communist Party is a legal party and defends its legality. Prohibition of advocacy of force and violence does not apply to the Communist Party; it is properly applied only to the Black Legion, the Ku Klux Klan, and other fascist groupings, and to the strike-breaking agencies and the open-shop employers who use them against the working class, who are responsible for the terrible toll of violence which shames our country."

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ized actions of the working class in collaboration with its allies from other sections of the population.

The revolution does not simply *happen*; it must be *made*. This does not imply that the Communist Party "makes" the revolution. The socialist revolution is carried out by the great masses of toilers. The Communist Party, as the vanguard of the most conscious toilers, acts as their organizer and guide. It gives the masses political awareness of their problems, a realistic program that will solve these problems; the heightened class consciousness of the workers leads them to follow the Communist Party.

The transfer of state power from the capitalists to the working class, which begins the social revolution, can be accomplished only under certain conditions which have an objective existence independent of the desires of the struggling classes. There must be what we Communists call "a revolutionary situation". Such a situation develops when the ruling class can no longer dominate society in the old way; when the economic system breaks down and can no longer feed the masses; when the middle classes are wavering and a considerable part have turned against the rulers; when the capitalists themselves have lost confidence in their ability to solve their own problems; and when capitalist control of the armed forces of the state has been undermined and shaken.

Under such circumstances the revolutionary will-to-power of the workers, their heroism, their self-sacrifice, their enthusiasm to struggle for a new order, strike telling blows against a ruling class which is already shaken and conscious of its own doom. In this revolutionary situation, the Communist Party, which has won the active support of the majority of the working class and of the decisive sections of the other exploited classes, wins some of the armed forces to its side, and leads the effective majority of the population to the seizure of state power. There can



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be no such first step if there is no revolutionary situation, or if the Communist Party has failed to rally the support of the majority of the population. After this first step of taking state power has been realized, the workers make use of the state power to take possession of the instruments of production. Then the new government, at the head of the masses, reorganizes the entire national economy of the country in an organized and planned manner, along socialist lines.

So long as the capitalists retain complete control of the armed forces and their deadly weapons, they can defeat the revolt of the masses. In a revolutionary situation, however, the capitalists lose their former complete control of the armed forces. Capitalists do not fight their own battles; we have seen that they are but a tiny fraction of the population. To maintain their rule they need the support of sections of the population whom they bribe or dope with demagoguery. Above all, they need the armed forces. But soldiers and sailors come from the ranks of the workers. They can be, and must be, won for the revolution. *All revolutions have been made with weapons which the overthrown rulers had relied on for their protection.*

We must dispose of the false notion that Communists believe that a revolutionary situation can only arise out of a second world war. Communists are opposed to another imperialist war and strive to organize the workers to defeat the plans of the warmongers. It is the uncompromising fight against war, not the imperialist war as such, which leads to revolution. Revolution arises out of imperialist war, not because revolutionists "welcome the war", but because they fight against the war before it comes with all their power, and if this is insufficient to stop the war, they lead the masses in struggles for peace that transform the imperialist war into a civil war against the oppressing

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class. It must be pointed out that a revolutionary situation could arise independently of whether an international war was being fought or not. At the same time, any large scale imperialist war, under the present conditions of capitalist decline, will inevitably bring about a revolutionary situation.

History does not show a single example in which state power was transferred from one class to another by peaceful means, whether in the form of voting or some other method of formal democracy. We have seen that the United States was able to win its independence only after a fierce and costly war. The elimination of chattel slavery in the South and the subsequent opening up of the entire country to the unchecked development of capitalism required four years of bloody civil war. These American examples can be duplicated in every country. We have seen how, in Italy and Germany, when capitalism faced the danger of the growing revolt of the masses, fascism emerged right out of the womb of bourgeois democracy. Fascism is truly the enemy of democracy, which it devours in the most bestial fashion the world has ever seen. Wherever capitalism is confronted with a life-and-death crisis, it turns to fascist force and violence to destroy the civil liberties of the masses. It is the capitalist who utilizes unlimited violence against the toilers; it is the fascists who raise mass sadism to a ruling principle.

Communists, despite what their enemies say, do not advocate or idealize violence. A violent struggle with the capitalists is by no means our choice or preference. We know only too well the terrible price workers have to pay as the result of the violence employed by the capitalists against them every day. We would be only too delighted if the capitalists would voluntarily scrap the deadly weapons which they use against the population at home, and

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which they are piling up in unprecedented quantities for a second world war. But we would be more than fools, we would be criminals, if we did not warn the toilers that capitalists will not peacefully submit to the dictates of history. They will not allow the human race to move smoothly to a new and better society. We know that rather than turn over control to the workers they would first destroy all of civilization.

The more that capitalism disintegrates the more desperate will be its actions against the masses of the people, the more fiercely will it use unrestrained violence to keep down rising discontent, and the more frantically will it destroy those formal democratic rights that once it granted when it felt itself strong and secure. Here in the United States, the classic land of bourgeois democracy, the most authoritative spokesmen for the ruling class have openly declared that they will abolish all civil liberties and establish a fascist dictatorship, rather than allow any fundamental change in the economic system. Under the Roosevelt administration big strides in this direction were taken. The martial law and terror used against strikers throughout the strike wave of 1933-35 gave a pretty good sample of what the capitalist class has in store for the workers. Would even the most optimistic pacifist pretend that the white landlords in the South will ever peacefully grant democratic rights to the Negroes, not to speak of land? Would the mine operators, the textile mill owners, and all the capitalists who have murdered their workers in cold blood when they merely asked for union recognition, ever turn over their mines, mills and factories to the workers without a struggle?

The workers are permitted democratic rights only so long as they do not employ them against capitalism. The moment they begin to use these limited democratic rights

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to better their economic conditions, then the capitalists immediately move against these democratic rights. That is why it is so necessary for the anti-fascist movement in the present situation in the United States to fight for the democratic rights of the toilers.

But for the workers to win a real democracy for themselves they must organize the dictatorship of the proletariat against the capitalists. Just as the capitalists enjoy democracy among themselves by suppressing the toilers, so can the latter enjoy democracy only by suppressing the capitalist class. The decisive question is democracy for whom, and the dictatorship against whom. We Communists propose to reverse the present situation, to provide democracy for all the toilers and dictatorship against the bankers, monopolists and other capitalist racketeers.

If bourgeois property is to be maintained under the present conditions of capitalist crisis, then the ruling class says there must be the destruction of surplus goods and productive forces accompanied by the most brutal suppression of the suffering masses. If the productive forces and accumulated wealth of society are to be preserved and further developed, the property rights of the capitalists and the institutions by which they are maintained must be abolished, and the exploiting minority and its agents suppressed. Thus, some form of violence is unavoidable. There is no possible choice between violence and non-violence. The only choice is between the two sides of the class struggle.

If the capitalists should win the immediate fight, it will not mean a solution of the problems of the capitalist crisis. All the antagonisms which brought on the decline of capitalism will be intensified many-fold and a new and more violent crisis will develop. But if the progressive forces in society can overcome the violence of the capitalists, then

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mankind will be able to leap forward to a new and higher stage of history. The planned utilization of all productive possibilities will for the first time release humanity from the tyranny of man over man, and the subjection of mankind to the whims of nature. As Engels said, mankind will then be able to go from the kingdom of necessity to the kingdom of freedom.



**"The People's Front", by Earl Browder, Part II,  
Chap. III (pp. 197-203).**

**ON CHURCH, HOME and VIOLENCE\***

*Mr. Browder, we have heard a great deal of Communists advocating the overthrow of the United States government by force. I think it will clarify the situation greatly were you to tell us just what the stand of your Party is on that particular question.*

The Communist Party does not advocate force and violence. It is a legal party and defends its legality. Communists are not conspirators, not terrorists, not anarchists. The Communist Party is an open revolutionary party, continuing under modern conditions the revolutionary traditions of 1776.

*Just how do you find a basis of comparison between those conditions and the year 1936?*

America was born as an independent nation out of a conflict that rose between the interests of the masses of the people on one side and the then existing government on the other side. The Declaration of Independence laid down the fundamental revolutionary principle that when such a conflict arises the people have the right and the duty to establish a new form of government to guarantee their future security. We Communists maintain the Declaration of Independence today. We do not, however, make the issue of a new form of government the question to be decided in the 1936 elections. We know that the overwhelming majority of the American people are not prepared to choose a new form of government.

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\*A radio interview given by Earl Browder, in Hartford, Conn., on October 6, 1936. The questioner was Cedric W. Foster, newspaperman in charge of public relations for station WHTT which carried the interview.—Ed.

*"The People's Front."*

*Just what do you make as the issue in the election four weeks from now, and just what do you think the American people are prepared to do if they are not ready to choose a new form of government?*

We say the chief issue is the choice between progress and reaction, between democracy or fascism. We believe the great majority of the American people are prepared to accept a definitely progressive platform based upon protection and extension of democratic rights. Unfortunately this majority is not yet organized for political action. It has been trying unsuccessfully to get the progressive platform adopted by one or other of the old parties. Today these people are turning toward the formation of a new party which in most places takes the form of the Farmer-Labor Party.

*Well, doesn't this constitute an abandonment by the Communist Party of the revolutionary principles to which it has always adhered?*

No, the Communists systematically advocate their revolutionary principles, that is, the necessity of socialism to replace the present capitalist system. But until that becomes a practical issue for the majority of the people, the Communists will join hands with all of those who fight for a better life under capitalism. The improvement of living conditions under capitalism may delay the revolutionary change to socialism but it will provide a more peaceful, less difficult and less painful transition to socialism when the time comes.

*With all this talk of socialism, creeping in here, Mr. Browder, why don't you join hands with Norman Thomas*

*"The People's Front."*

*and have one party, a combination of Socialists and Communists?*

That's a good idea and we proposed that to Norman Thomas.

*What was his reaction?*

Norman Thomas rejected the idea of uniting the forces that want socialism. He goes farther and refuses to help build the Farmer-Labor Party to unite all of those who want to stop reaction and fascism. Norman Thomas says the issue in 1936 is the choice between socialism or capitalism. He's not interested unless he can get socialism right away. Norman Thomas has even said that it might be better if Landon, the extreme reactionary, were elected.

*Well, then, please tell me briefly just what is the difference between your beliefs and those of Mr. Thomas, if there is any difference.*

In the immediate issues of the day our main difference with Thomas is that we stand for a united front of all the progressives while Thomas rejects that idea. On the question of the future socialistic society our difference is chiefly that Thomas thinks that socialism can be established without a revolution.

*May I interpose here, Mr. Browder. When you say revolution do you mean the generally accredited definition of that term which is war, bloodshed and suffering or do you mean an education revolution accomplished at the polls?*

We have no different definition of revolution than that given to us by Thomas Jefferson.

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Jefferson pointed out that the bloody war of 1776, which was necessary to establish American independence, was not caused by advocacy of force and violence by the patriots of those days but by the determination of a government which was separated from the people to impose its will at all costs. So long as the people can control their government there will be no necessity for a bloody revolution. If the capitalists would submit to the decisions of the American people the change to socialism will be bloodless.

*In other words Communistic principles do not advocate the waving of a red rag in the streets and machine guns mowing down the populace and that, Mr. Browder, I am frank to confess is just what many people believe.*

It is through just such an interview as this, Mr. Foster, that we are trying to break down that belief. We Communists want to prevent a continuance of the violence that shames American life. Machine guns are not strangers to American streets, but it has never been the Communists that have brought them out. It is usually the strike-breaking agencies employed by the capitalists which have made machine guns and gas bombs commonplace experiences to large numbers of the American people. We would like to stop all that. If the employers further develop this kind of warfare upon the American working people, they are the ones who are forcing the issue.

*There is another question I want to ask you, Mr. Browder. It has to do with religion. According to press reports most of the churches in Russia have been demolished under a Communistic regime. Do you believe that religion is not necessary for the welfare of mankind, and if you do not believe that how do you justify the demolition of the churches?*

The Communists stand for unconditional freedom of worship. The reason why the church in Russia suffered from

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the revolution is because it was a state church bound up with the old tsarist regime of oppression which was a by-word throughout the world. It was a political instrument of the tsarist autocracy and when the Tsar was overthrown it tried to reestablish tsarism. Similarly, in Spain today, the church is suffering because it made itself the center of an organized rebellion to overthrow the democratic republic and its buildings were made into arsenals for the fascist rebels. When the church enters politics in this way the church will always suffer. If the church separates itself from the state and confines itself to its proper sphere of religion it will have nothing to complain of anywhere.

The Soviet Union divorced the church from the state and established the American system in these relations. We Communists, in general, are not adherents of any church; in this respect we follow the examples of Abraham Lincoln and Thomas Paine.

*Speaking of divorcing church from state, Mr. Browder, brings up the subject to my mind of marriage and divorce. I believe it was Theodore Roosevelt who said, "When the home disintegrates the nation decays." Don't you believe that the ease with which divorce is obtained in Russia tends to lower the moral standards of the people? I don't believe you advocate such a lowering of standards?*

Roosevelt was correct. One of the signs of decay in American capitalist society is the tragic break-up of millions of homes which is going on under the blows of unemployment. All of the immediate measures proposed by the Communists are aimed to protect the home. We do not think that the home can be maintained, however, by making divorce more difficult. The proper way is to create conditions under which people won't want divorces. Permanent and healthy family life is best built upon the secure posses-



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sion by all people of the material basis for the family; that is, adequate housing, plenty of food and clothing, and an assured income. It is still true very often that when poverty walks in through the door love flies out of the window. Abolish poverty and the problem of divorce will largely disappear.

*Well, that seems to settle that, Mr. Browder. While we are on the subject of Russia I want to ask you another question. It has always been my belief that when any group of individuals, be they Communists or any other party adherents, come into power, they may forget they represent the common every-day man and woman and seek avariciously for more and more power. In other words, there enters the human element. Do you as a Communist claim your Party leaders immune from such lust for power that they will always remember the people whom they serve? Might they not fall into the category of the persons you term capitalists and whom you oppose?*

We Communists are the last ones to deny the human element in all social problems. That is why we consider it so important that the working class shall be represented by a highly organized party which sets exemplary standards for its leadership and enforces these standards ruthlessly. Without such systematic and organized control of the leadership, through a party arising directly from the mass of the people and controlled by them, it is quite true that leadership tends to degenerate. This is especially true under conditions of capitalism which sets as the highest standard for each individual, not the service of the general good, but the accumulation of individual wealth. We do not think this is a permanent characteristic of human nature. This is only a product of the individualistic capitalist society. A deeper feature of human nature is the desire to win the

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esteem of one's fellows. When this esteem can be secured only by serving the common good, then human nature will flower as never before in history. The individual will find his greatest good in the common service.

*In closing this interview, Mr. Browder, will you sum up briefly the aims of the Communist Party and what it stands for in the 1936 elections?*

The Communist Party in the present election strives first of all to unite all the progressive forces in the country in a Farmer-Labor Party with a program which calls for the provision of jobs and a minimum wage for all; social security for those who cannot work through old-age pensions and unemployment insurance; guaranteed opportunity for education and work for the young people; security for the farmer in the possession of his farm and an adequate income; maintenance and extension of democratic rights and popular control of the government; a system of public finance based upon ability to pay, that is, taxation of the rich, with abolition of sales taxes; complete equality for the Negro people by the enforcement of the Constitution; and a peace policy to keep America out of war by keeping war out of the world. This platform can be summed up as a program of democracy against fascism, of progress against reaction. It can be accomplished through organizing the people in a Farmer-Labor Party. The experience in fighting for these demands, will, we believe, convince the majority of the people at some future time that it is necessary and possible to go forward to a new system of society which we call socialism. Socialism is that system whereby the people take over as their common property the basic economy of the country and operate it through their people's government for the benefit of the whole population. These, Mr. Foster, are our immediate and ultimate aims, and these are the principles for which we are struggling.

**Statement of Earl Browder, General Secretary of Communist Party, U. S. A., to the McNaboe Committee, June 29, 1938.**

Since the Joint Legislative Committee to Investigate the Administration and Enforcement of the Law is directed, by the Resolution establishing it, to inquire into the control of criminal tendencies, and problems of enforcement of the criminal laws of the State, I must assume that I have been called before it, as General Secretary of the Communist Party, to establish my Party's attitude to this subject, and not for a political inquiry.

The Communist Party agrees that the criminal laws are laxly enforced, and that much could be done, to the good of the public, to remedy this situation. This is particularly true of criminality in high places, as exemplified by the recent case of Mr. Richard Whitney, and some current cases brought to light by District Attorney Dewey. There can be no doubt that such criminals in high places contribute much to the creation of the general problem, both in the way of example to large numbers of unfortunate people who find themselves unable to earn a decent livelihood by honest labor, and in the way of directly corrupting the law enforcement machinery. It would be most profitable, therefore, in our opinion, if the Joint Committee would direct its investigation in the first place toward locating the cause of such startling examples of criminal tendencies in the higher circles of society. We make this suggestion to the Committee for what it may be worth.

The Communist Party has been itself accused in some quarters of fomenting disrespect of the criminal law, and of fomenting breaches of public order. These charges are, one and all, without foundation in fact, are falsehoods, designed for the ulterior purpose of discrediting the political program of the Communist Party. The Communist Party is a legal political party, operating by legal means exclu-

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sively, defending its legality under the Constitution of the United States and of the State of New York.

Some people have accused the Communist Party of hypocrisy and insincerity in its repudiation of illegal methods of conspiracy and terrorism, and add this charge to the original ones against us. The best refutation of this new charge is the fact that the Communist Party membership, most of it recruited within the past two years, has joined the Party precisely as a result of the Party's publicly proclaimed policies, and would quickly abandon the Party if they should find a contradiction between its inner convictions and beliefs and those which it publicly proclaims. Our Party membership is educated in the spirit of democracy and the American tradition, and all the Party's work is permeated throughout with this spirit. I submit to the Committee typical examples of the Party literature circulated in millions of copies.

At the 8th, 9th, and 10th National Conventions of the Communist Party, held in 1934, 1936, and 1938, more and more decisive answers were given to the slanders of our enemies. At the 10th Convention, at the end of May, these answers were summed up in provisions written into the Party Constitution, the basic law of the Party, by which every member is bound, and which supersedes all other documents or records of any kind, which document I submit to the Committee. I especially call your attention to Article VI, Section 1, which reads:

"The Communist Party of the U.S.A. upholds the democratic achievements of the American people. It opposes with all its power any clique, group, circle, faction, or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions

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of American democracy whereby the majority of the American people have obtained power to determine their own destiny in any degree. The Communist Party of the U.S.A., standing unqualifiedly for the right of the majority to direct the destinies of our country, will fight with all its strength against any and every effort, whether it comes from abroad or from within, to impose upon our people the arbitrary will of any unselfish minority group or party or clique or conspiracy."

Accusations have been made against the Communist Party that it seeks to stir up strikes and industrial disorders, for their own sake and not for the interests of the workers. Nothing could be further from the truth. The Communists everywhere give all their influence in favor of the establishment of the workers' rights of organization and improvement of their conditions through collective bargaining, and for the utilization of the right to strike only as a last resort, when all other means of protecting their rights have failed. Communists use all their influence to help assure the orderly conduct of such industrial disputes as may arise. Any and all charges to the contrary are false and without foundation in fact.

A familiar charge against the Communist Party is that it receives "orders from Moscow", or that it is financed by "Moscow gold", or that it is a Party of aliens. There is no truth in any of these charges. The Communist Party makes its own decisions, it has never received orders from Moscow or anywhere else, and if it did receive any such orders it would throw them in the wastebasket; the Communist Party finances itself entirely from its own resources within the country; its membership is composed 99 per cent. of its citizens of the United States, and all its mem-



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bers must declare their intention of becoming citizens if they are not already citizens.

A current attack against the Communist Party is that it is attempting to gain control of labor unions, and particularly of the C. I. O. There is no truth in this charge, the Communist Party does not want control of any labor organizations, and when its members are elected to any trade union offices this is entirely upon the basis of their contribution to the life of the union itself, and not upon any interests of the Communist Party as such. The Communists opposed with all their influence the separation of the C. I. O. unions from the A. F. of L., and since the separation of the unions under two centers, have continued to support the building of both A. F. of L. and C. I. O. unions, and for bringing the two bodies together again into a united labor movement. In so far as Communists are active in the C. I. O. unions, these unions originally were in the A. F. of L., and were excluded therefrom as a body, without reference to any Communist activity therein. The cry against Communists in some few unions, as for example, the United Auto Workers, arises not from protest against Communist activity, but in large part is a stratagem to defeat the plans of the broadest progressive movement to work for the reelection of Governor Murphy of Michigan.

I have no desire to hide the fact that there are some people who call themselves Communist, who yet proclaim the opposite of all these policies of the Communist Party which I have described. These are the groups known as Trotskyites and Lovestoneites. But while these groups call themselves Communist, it should be known that they are the bitterest enemies of the Communist Party; that they lend their services to all and sundry who for any reason wish to discredit or attack the Communist Party, and

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that they are not Communists at all in any honest meaning of the term. Their one and only function is to give Communism a bad name by every means at their disposal. Their only claim to the name of Communist is that many years ago, some of them occupied posts in the Communist Party, until their true nature was discovered and they were unconditionally expelled from the Party and exposed to the public, expulsions which took place in the years of 1928 and 1929, that is, nine and ten years ago.

The Communist Party is deeply conscious of the fact that the rise of fascism in many countries, its spread and its threat against the peace and democracy of the whole world, including the United States, has increased ten-fold the duty of every citizen and organization to make clear its stand toward these dangers. The Communist Party has unconditionally aligned itself upon the side of democracy and peace, against fascism and war, and is working with constantly increasing success in cooperation with all peace-loving and democratic-minded people for the common aims of all.

EARL BROWDER.



# SUPREME COURT OF THE UNITED STATES.

No. 330.—OCTOBER TERM, 1938.

Eugene Kessler, District Director of  
Immigration and Naturalization,  
Petitioner,  
vs.  
Joseph George Strecker.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Fifth Circuit.

[April 17, 1939.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The respondent is an alien who entered the United States in 1912 and has since resided here. In 1933 he applied for naturalization to a United States District Court in Arkansas. He made certain admissions to a District Director of Naturalization as a result of which naturalization was withheld and his case was referred to the Department of Labor.

November 25, 1933, the Second Assistant Secretary of Labor issued a warrant for the respondent's apprehension, in which it was recited that he was in the United States in violation of law in that (1) he believes in, advises, advocates or teaches the overthrow, by force or violence, of the Government of the United States; (2) he is a member of, or affiliated with, an organization, association, society, or group that believes in, advises, advocates or teaches the overthrow, by force or violence, of the Government of the United States; (3) he is a member of, or affiliated with, an organization, association, society, or group that writes, circulates, distributes, prints, publishes or displays, or causes to be written, circulated, distributed, printed, published or displayed, or that has in its possession for these purposes written or printed matter advising, advocating or teaching the overthrow, by force or violence, of the Government of the United States; and (4) after his entry into the United States he has been found to have become a member of one of the classes of aliens enumerated in Section 1 of the Act of October 16, 1918, as amended by the Act of June 5, 1920, to wit: an alien who is a member of, or affiliated with, an organization, association, society

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or group that believes in, advises or teaches the overthrow, by force and violence, of the Government of the United States.

The respondent was apprehended and was given hearings before an Immigration Inspector, at which he was represented by counsel and testified in his own behalf. The Government offered in evidence transcripts of his examination by the Naturalization Bureau, of an interview with him by an Immigration Inspector, and his membership book in the Communist Party of the U. S. A., issued November 15, 1932, with stamps affixed showing payment of dues to the end of February, 1933. The rules of the party, set forth in the book, provided that a failure to pay dues for three months automatically results in the loss of membership, and it is admitted there is no evidence respondent continued to be a member after March 1, 1933.

The book contained printed matter stating the purposes and objects of the party. The Government also offered a copy of a magazine called "The Communist", dated April 1934, and read into the record excerpts from articles appearing therein. The respondent admitted that he joined the Communist Party in November 1932, asserted that his membership terminated prior to March 1, 1933, and had never been renewed, and professed ignorance of the magazine called "The Communist" and its contents. In some respects his testimony as to his beliefs and actions was contradictory of his statements on prior examinations, and testimony was elicited from him in an effort to show that his denial of present affiliation with the Communist Party might not be made in good faith; but there was no sufficient evidence to sustain that conclusion. After a review of the record by the Board of Review of the Department of Labor, a warrant of deportation was issued by the Assistant Secretary which recites an affirmative finding as to each of the counts in the warrant of arrest and orders the respondent's deportation.<sup>1</sup>

The respondent petitioned a federal district court in Arkansas for a writ of *habeas corpus* to deliver him from the custody of the Immigration Inspector. The writ was denied. Thereafter he filed the petition in the instant case in the District Court for Louisiana. In this petition he alleged that he had not been accorded a fair hearing; that the Department of Labor had not correctly construed

<sup>1</sup> The delay in this case is due to the fact that respondent was born an Austrian subject but was refused reentry into that country on the ground that the place of his birth is now in Poland. Protracted negotiations on the part of the Department were required to obtain the consent of the government of Poland to his return to that country.

the immigration laws applicable to his case; that the findings were without support in the evidence; that he had been denied due process of law, and that he is not a citizen of Poland, to which the warrant directed his remission. The District Court dismissed the writ. The respondent appealed to the Circuit Court of Appeals assigning error to the District Court's action in denying each of his contentions. That court found that the hearings had been fair, but held that each of the findings recited in the warrant was without support in the evidence. The court was of opinion the evidence failed to show that the respondent is now a member of the Communist Party or that he or that party, in 1933, taught, advocated, or incited the overthrow of the Government by force and violence, and that the record was bare of evidence to countervail his denial that he had ever taught or believed in the unlawful destruction or overthrow of the Government by force. The court held that the Acts of 1918 and 1920 were passed to meet a situation caused by crises in Russia in 1918 and 1919;<sup>2</sup> that the major changes in policy and conduct of the Soviet Socialist Republics which had taken place between 1918 and 1933 rebutted the implications arising from membership in the Communist Party at the time the Acts were adopted; that mere membership in that party in 1933 is not a statutory ground for deportation. The order of the District Court was reversed and the cause was remanded for further proceedings not inconsistent with the opinion.<sup>3</sup>

The Government moved for a rehearing, pressing specially the contention that the overwhelming weight of authority is to the effect that membership in the Communist Party is sufficient to warrant deportation. The petition was entertained, the judgment was amended to provide: "Reversed, with directions to try the issues *de novo* as suggested in *Ex Parte Fierstein*, 41 Fed. (2d) p. 54"; and a rehearing was denied.<sup>4</sup> Judge Sibley dissented on the ground that on the basis of the respondent's membership book which refers to the Third Communist Internationale, the court could take judicial notice of the objectives and programs of the Communist Party and the Third Internationale.

<sup>2</sup>That this view is erroneous is shown by the history of the legislation referred to *infra*, p. 6. Compare, House Report 504, 66th Cong., 2nd Sess., p. 7; Senate Report 643, 66th Cong., 2nd Sess., p. 4.

<sup>3</sup>95 F. (2d) 976.

<sup>4</sup>95 F. (2d) 1020.

The United States petitioned for certiorari, asserting that the single question presented is "whether the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States." In its specification of errors to be urged the Government enumerated (1) the holding that an alien who became a member of the party in 1932 is not, by reason of that fact, subject to deportation; (2) the holding that the evidence before the Secretary of Labor concerning the principles of the party was insufficient to sustain the order; (3) the remand for a trial *de novo* in the District Court, and (4) the failure to affirm the judgment of the District Court. As reason for the granting of the writ the Government urged a conflict of decision on the question whether membership by an alien in the Communist Party of America subjects him to deportation. By reason of the allegation of conflict and the action of the Circuit Court of Appeals in ordering a trial *de novo* in the District Court, we granted the writ.

The Government does not attempt to support the warrant of deportation on the second and third grounds therein specified, namely, that the respondent "is a member of or affiliated with" an organization described in the Act. The only evidence of record is that his membership ceased months before the issue of the warrant for his arrest. The contention is that respondent is deportable because, after entry, he became a member of a class of aliens described in Section 1 of the Act, to wit, a member of the Communist Party, an organization membership in which is made a cause of deportation because the organization believes in, advocates, and teaches the overthrow of the Government of the United States by force and violence. This contention presents the question whether the Act renders former membership in such an organization, which has ceased, a ground of deportation. Respondent insists that the statute makes only present membership in an organization described in the Act such ground.

Section 1 of the Act of October 16, 1918, as amended in 1920,<sup>5</sup> has to do with the exclusion of alien immigrants and specifies five classes, members of which may not be admitted to the United States. One of these classes—subsection (c)—includes "aliens who believe in, advise, advocate, or teach, or who are members of or

<sup>5</sup> Act of Oct. 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008; U. S. C. Tit. 8, § 137(a) to (e).

affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States. . . ."

Section 2 of the Act of 1918,<sup>6</sup> which was not altered by the Act of 1920, deals with deportation. It provides that "any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any of the classes of aliens enumerated" in Section 1, shall, upon warrant of the Secretary of Labor, be taken into custody and deported, in the manner provided by law.

Relying on the phrases italicized in the quotation, the Government insists that the section embraces an alien who, after entry, has become a member of an organization, membership in which, at the time of his entry, would have warranted his exclusion, although he has ceased to be a member at the time of his arrest. We hold that the Act does not provide for the deportation of such an alien. This conclusion rests not alone upon the language, but, as well, upon the context and the history of the legislation.

The phrase "at any time" qualifies the verb "found". Thus, if at any time the Secretary finds that at entry the alien was a member, or has thereafter become and is a member, he may be deported. The natural meaning is that, as the alien was excludable for present membership, he is deportable for present membership subsequently acquired. The Government's construction, which collocates the phrase "at any time" with the phrase "or to have become thereafter" is unnatural and strained. If Congress meant that past membership, of no matter how short duration or how far in the past, was to be a cause of present deportation the purpose could have been clearly stated. The section does not bear this import.

By the first section of the Act, as amended in 1920, aliens are to be excluded who *are* members of a described organization. The section does not require the exclusion of those who have been in the past, but are no longer, members. When the Congress came to provide for deportation, instead of again enumerating and defining the various classes of aliens who might be deported, it provided that if at any time it should be found that an alien had been admitted, and, at the time of admission, was a member of any of the proscribed classes, or had thereafter become such, he should be deported. It is not to be supposed that past membership, which does not bar admission, was intended to be a cause of deportation. And

<sup>6</sup>40 Stat. 1012; U. S. C. Tit. 8, § 137(2).

the fact that naturalization is denied to an alien only on the ground that he "is a member of or affiliated with any organization entertaining" disbelief in or opposition to organized government, and not for past membership or affiliation,<sup>7</sup> lends added force to this view.

In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization. In the absence of such expression we conclude that it is the *present membership*, or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation. Since the statute deals not only with membership in an organization of the described class, but with affiliation therewith and, as well, with belief and teaching, it enables the Secretary of Labor, as trier of the facts, fully to investigate and to find the true relation, belief and activity of the alien under investigation.

The legislative history of the statute supports this conclusion. By Act of March 3, 1903,<sup>8</sup> Congress directed the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States,"<sup>9</sup> and also of any "person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government."<sup>10</sup> The only section authorizing deportation of such persons is directed to an alien found to have entered in violation of the Act, if proceeded against within three years after entry.<sup>11</sup> These provisions were reenacted without alteration in the Act of February 20, 1907.<sup>12</sup>

The first legislation authorizing deportation of persons who had entered lawfully is H. R. 6060, enacted by the 63rd Congress but vetoed by President Wilson January 28, 1915.<sup>13</sup> This bill required deportation of "any alien who *within five years after entry* shall be

<sup>7</sup> Act of June 29, 1906, c. 3592, § 7, 34 Stat. 596, 598.

<sup>8</sup> 32 Stat. 1213.

<sup>9</sup> Sec. 2, 32 Stat. 1214.

<sup>10</sup> Sec. 38, 32 Stat. 1221.

<sup>11</sup> Sec. 21, 32 Stat. 1218.

<sup>12</sup> 34 Stat. 898, §§ 21 and 38, pp. 905, 908.

<sup>13</sup> House Document No. 1527, 63rd Cong., 3rd Sess.



found advocating or teaching" the defined doctrines. It also altered existing law in respect of deportation of those who had entered illegally to provide that "*at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law*" should be deported.

A bill, in substance the same, was introduced in the 64th Congress and enacted February 5, 1917, over Presidential veto.<sup>14</sup> While this measure was in course of passage, the Chairman of the House Committee in charge of it moved, on behalf of the Committee, to amend section 19 by inserting the phrase "*at any time*" so that the section should provide for deportation of "*any alien who at any time after entry shall be found advocating or teaching*" forcible overthrow of the government. The Act, as adopted, was in this form. The purpose of the amendment was to make plain that no time limit was fixed for deportation of aliens found advocating the doctrine.<sup>15</sup> The Act of 1917 was amended by that of October 16, 1918, here under consideration, which, by its title, purported to apply to "*aliens who are members of the anarchistic and similar classes.*"

Section 1 enlarged one of the classes of excludable aliens by the addition of the words "*aliens who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States.*"

Section 2 modified the earlier Act in respect of deportation, both in form and substance. The provision for deportation of those who, at the time of entry, were members of one of the proscribed classes was retained, but the five year period of limitation within which deportation might be had was eliminated.<sup>16</sup> The provision for deportation of aliens of anarchistic and similar classes was expanded by including as causes of deportation all the causes of exclusion enumerated in Section 1 which were themselves much broader than those included in the 1917 Act. Thus, although there was no provision in the Act of 1917 for deportation of aliens who did not personally advocate the proscribed doctrine, but were members of an organization which did, the Act of 1918 embodied such a provision. This alteration, and the elimination of the five year time limitation, were the important changes, relevant to the

<sup>14</sup> 39 Stat. 874.

<sup>15</sup> See 53 Cong. Rec. Part. 5, p. 5165, 64th Cong., 1st Sess.; Sen. Rep. 352, p. 14, 64th Cong. 1st Sess. to accompany H. R. 10384.

<sup>16</sup> House Rep. 645, 65th Cong., 2nd Sess.

question under examination, which the Act of 1918 effected in the earlier legislation. These modifications lend no support to the contention that Section 2 of the Act of 1918 was intended to make quondam membership a ground of deportation.

Nor is there anything in the formal alteration worked by the Act of 1918 which leads to a different conclusion. Section 19 of the Act of 1917 dealt in distinct clauses with the various classes of aliens who might be deported, specifying in one clause an alien "who at the time of entry was a member of the classes excluded by law" and, in another clause, an alien "who, at any time after entry, shall be found advocating or teaching" the obnoxious doctrines. Section 2 of the Act of 1918 combined the clauses dealing with the two groups in a single sentence, with a somewhat different locution. We think this consolidation was not intended to alter the substantive law as it theretofore stood.

The only decisions which support the Government's position are those in the Second Circuit.<sup>17</sup> We cannot approve their reasoning or result. It is claimed that the administrative construction has always accorded with the Government's contention in the present case. We cannot find that there has been such a uniform construction as requires an interpretation of the Act in accordance with that view. The administrative construction seems to have been in favor of the respondent's view until after the decision in the *Yokinen* case,<sup>18</sup> and the construction seems to have been changed in deference to the decision in that case.<sup>19</sup>

Our reading of the statute makes it unnecessary to pass upon the conflicting contentions of the parties concerning the adequacy of the evidence before the Secretary concerning the purposes and aims of the Communist Party or the propriety of the court's taking judicial notice thereof.

The Solicitor General suggests that the evidence is sufficient to sustain the warrant of deportation on the first ground therein stated, namely, that the respondent believes in and teaches the overthrow, by force and violence, of the Government of the United States. It is said that the error of the Circuit Court of Appeals in reversing the District Court is, in this aspect, so plain that we

<sup>17</sup> *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707; *United States ex rel. Mannisto v. Reimer*, 77 F. (2d) 1021.

<sup>18</sup> House Rep. 504, p. 9, 66th Cong., 2nd Sess. Hearings Communist and Anarchistic Deportation Cases, H. R. 66th Cong., 2nd Sess. Subcommittee of Committee on Immigration and Naturalization, April 21, 24, 1920, p. 17.

<sup>19</sup> See letter of Secretary of Labor embodied in Senate Rep. 769, 75th Cong., 1st Sess.

should notice it, although the petition does not present the question. We have the power to do this in the case of plain error,<sup>20</sup> but we exercise it only in clear cases and in exceptional circumstances.

We do not know on what grounds the District Judge's action rested since he wrote no opinion. The Circuit Court of Appeals held the evidence insufficient to support the Secretary's finding. We think that the record does not justify a reversal of the holding of the court below upon this point.

The Circuit Court of Appeals remanded the cause to the District Court for a trial *de novo*. In this we think there was error. The proceeding for deportation is administrative.<sup>21</sup> If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings.<sup>22</sup> If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside.<sup>23</sup> A district court cannot upon *habeas corpus*, proceed *de novo*, for the function of investigation and finding has not been conferred upon it but upon the Secretary of Labor. Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial *de novo* of that issue in the district court.<sup>24</sup> The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of the jurisdiction conferred upon the Secretary.<sup>25</sup>

It follows from what has been said that, as the Secretary erred in the construction of the statute, the writ must be granted and the respondent discharged from custody.

The judgment of the Circuit Court of Appeals is accordingly modified and the cause is remanded to the District Court with instructions to proceed in conformity with this opinion.

*So ordered.*

<sup>20</sup> *Manler v. Eby*, 234 U. S. 32, 45.

<sup>21</sup> *Pearson v. Williams*, 202 U. S. 281; *Zakonaite v. Wolf*, 226 U. S. 272.

<sup>22</sup> *Zakonaite v. Wolf*, *supra*; *Tisi v. Tod*, 264 U. S. 131, 133.

<sup>23</sup> *Vajtsauer v. Commissioner*, 273 U. S. 103, 106; *Gegiow v. Uhl*, 239 U. S. 3.

<sup>24</sup> *United States v. Sing Tuck*, 194 U. S. 161, 167; *Bilokumsky v. Tod*, 263 U. S. 149, 153, 153.

<sup>25</sup> *Ng Fung Ho v. White*, 259 U. S. 276; compare *Tod v. Waldman*, 266 U. S. 113, 119.



# SUPREME COURT OF THE UNITED STATES.

No. 330.—OCTOBER TERM, 1938.

Eugene Kessler, District Director of  
Immigration and Naturalization,  
Petitioner,  
vs.  
Joseph George Streeker.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Fifth Circuit.

[April 17, 1939.]

Mr. Justice McREYNOLDS, dissenting.

Mr. Justice BUTLER and I cannot acquiesce in the disposition of this cause or in the supporting opinion just announced. It seems worthwhile briefly to indicate our views.

More than five years have passed since the alien respondent was arrested and ordered to show why he should not be deported. The record of the following proceedings before the Labor Department and in the courts, printed on eighty-four pages, is before us. It is not very difficult to understand. Without question we have power finally to dispose of the cause upon the merits notwithstanding any omissions or defects found in the petition for certiorari. In the circumstances, we think that course should be taken. The District Court upon another view of the record can ascertain nothing not open to us.

If this alien is guiltless of the charge against him he should be liberated without more ado; if guilty, the public should be relieved of his presence now. That he is an undesirable is made manifest.

The construction of the statute adopted by the Court seems both unwarranted and unfortunate. If by the simple process of resigning or getting expelled from a proscribed organization an alien may thereby instantly purge himself after months or years of mischievous activities, hoped-for protection against such conduct



will disappear. Escape from the consequences of deliberate violations of our hospitality should not become quite so facile.<sup>1</sup>

Seven years ago, the Court of Appeals, Second Circuit, construed the statute under consideration in *United States ex rel. Yokinen v. Commissioner of Immigration*, 57 F. (2d) 707-708. There the alien had been expelled from the Communist Party before his arrest, and for that reason he unsuccessfully claimed exemption. The following excerpts from the court's opinion, with force and directness, express our view concerning the true meaning of the enactment—

"It is true that he was not a member of the Communist Party when arrested. He had recently been expelled because of his attitude toward negroes, but that did not remove him from the reach of the statute. We have nothing to do with shaping the policy of the law towards aliens who come here and join a proscribed society. Congress has provided that 'any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section' shall be deported. 8 USCA § 137(g). This alien concededly did become after entry a member of 'one of the classes \* \* \* enumerated' and from that time became deportable. We are urged to ameliorate the supposed harshness of the statute by reading into it words that Congress saw fit to leave out and interpret it to apply not to aliens who became members, but only to those who become and continue to the time of their arrest to be members, of one of the enumerated classes. If the words used in the statute were equivocal or the intention of Congress for any reason uncertain, there might be room for such a construction as that for which the appellant now contends. Perhaps the sufficient answer is that had Congress intended membership at the time of arrest to be the criterion it would have said so. It has the power to determine what acts of an alien shall terminate his right to remain here. *Skeffington v. Katzeff et al.* (C. C. A.) 277 F. 129. What it did do was to make the act of becoming a member a deportable offense without regard to continuance of membership and it did that in language so plain that any attempt to read in any other meaning is no less than an attempt to circumvent the law itself.

"Since the appellant admittedly had, after entry, become a member of a proscribed organization, the undisputed evidence

<sup>1</sup> Strecker, born in Poland in 1888, was admitted to the United States in 1912.

He joined the Communist Party November, 1932 but paid no dues subsequent to February, 1933. He claims that under the Party rules failure to pay for four weeks causes membership to cease. Warrant for his arrest issued in November, 1933.

required the order from which this appeal was taken. All proof upon which he was held to be affiliated with the Communist Party was unnecessary, and while we do not mean to intimate that any evidence on that phase of the case was unfairly received and considered, in any event it did him no harm."

A petition for certiorari asking this Court to review the judgment of the Circuit Court of Appeals was refused October 10, 1932 (287 U. S. 607). It stressed the point that—"A fair and proper construction of the statute requires that it be confined in its operation to aliens who are members of or affiliated with a proscribed organization at the issuance of the warrant of arrest."

The unusual importance of the question was not difficult to appreciate.

In the presence of clear and positive expression of Congressional intent to the contrary we do not feel at liberty to conclude that an alien who after entry has shown his contempt for our laws by deliberately associating himself with a proscribed organization must be allowed to remain if he resigned or was debarred a day, a month or a year before his arrest. An experienced court years ago declared that would be "no less than an attempt to circumvent the law itself."

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